No. 93-7901

Supreme Court, U.S.
FILED
MAY 19 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL K. DELO, SUPERINTENDENT,
POTOSI CORRECTIONAL CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

SEAN D. O'BRIEN*
MISSOURI CAPITAL PUNISHMENT RESOURCE CENTER
5319 Rockhill Road
Kansas City, Missouri 64110
816/363-2795 •
FAX 816/363-2799

TIMOTHY K. FORD
MACDONALD, HOAGUE AND BAYLESS
1500 Hoge Building
705 Second Avenue
Seattle, Washington 98104-1745
206/622-1604 •
FAX 206/343-3961

Attorneys for Petitioner

JEREMIAH NIXON
FRANK JUNG*
OFFICE OF ATTORNEY GENERAL
Post Office Box 899
Jefferson City, Missouri 65102
314/751-3321 •
FAX 314/751-0774

Attorneys for Respondent

*Counsel of Record

BEST AVAILABLE COPY

Petition For Certiorari Filed February 14, 1994
Certiorari Granted March 28, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

178 pp

TABLE OF CONTENTS

Page

Chronological List of Relevant Dates 1

Petition for Writ of Habeas Corpus 4

Response to Order to Show Cause Why a Writ of Habeas Corpus Should Not Be Granted 17

Traverse 26

Supplemental Motion for Evidentiary Hearing 54

Respondent's Suggestions in Opposition to Petitioner's Motion for Evidentiary Hearing 58

Supplemental Motion to Expand the Record 62

Respondent's Suggestion in Opposition to Petitioner's Motion to Expand the Record 65

Memorandum and Order – United States District Court 68

Motion Pursuant to Rule 59(e) to Set Aside Order Dismissing Petition for Writ of Habeas Corpus 90

Supplemental Motion Pursuant to Rule 59(e) 118

Order Denying Petitioner's Motion Pursuant to Rule 59(e) 130

Opinion of the Eighth Circuit Court of Appeals in *Schlup v. Delo*, 11 F.3d 738 (8th Cir. 1993) 131

Order of Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, March 28, 1994 176

SCHLUP v. DELO
CHRONOLOGICAL LIST OF RELEVANT DATES AND EVENTS

02/03/84	Arthur Dade is killed in the Missouri State Penitentiary
12/09/85	Petitioner Schlup's trial commences
12/11/85	Jury convicts Petitioner and assesses the death penalty
03/03/86	Trial court imposes sentence of death
02/17/87	Missouri Supreme Court affirms Petitioner's conviction and sentence
06/08/87	United States Supreme Court denies certiorari
07/13/87	Petitioner filed motion for post-conviction relief in trial court
11/06/87	Trial court denies motion for post-conviction relief
10/18/88	Missouri Supreme Court affirms denial of post-conviction relief
01/05/89	Petitioner files first petition for writ of habeas corpus petition
11/21/89	United States District Court dismisses first habeas corpus petition
07/22/91	United States Court of Appeals affirms dismissal of first habeas corpus petition
02/23/92	Petitioner files petition for a writ of habeas corpus in Missouri Supreme Court
03/03/92	Petitioner files Rule 60(b) motion in United States District Court

03/04/92	Missouri Supreme Court dismisses petition and issues execution warrant
03/10/92	United States District Court denies FRCP 60(b) motion, but stays execution to allow filing of second habeas corpus petition
03/11/92	Petitioner files second petition for writ of habeas corpus in the United States District Court
08/23/93	United States District Court denies evidentiary hearing and dismisses petition for a writ of habeas corpus
08/27/93	United States District Court enters judgment dismissing petition
08/30/93	United States District Court grants certificate of probable cause
09/07/93	Petitioner files motion pursuant FRCP 59, to reconsider dismissal of petition for a writ of habeas corpus
09/14/93	United States District Court denies motion to reconsider
09/16/93	Petitioner files notice of appeal
10/15/93	United States Court of Appeals denies motion for stay of execution, over dissent by the Hon. Gerald W. Heaney
11/15/93	United States Court of Appeals affirms dismissal of habeas petition, over dissent
11/16/93	Petitioner files petition for rehearing and suggestion for rehearing *en banc*
11/17/93	United States Court of Appeals denies petition for rehearing *en banc*, over dissents

11/18/93	Governor of Missouri grants reprieve
02/14/94	Petitioner files Petition for Certiorari
03/28/94	United States Supreme Court grants Petition for Certiorari

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner, vs. PAUL DELO, Superintendent, Potosi Correctional Center, Respondent.	)	Case No. 4:92CV00443JCH Filed 3-11-92

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

COMES NOW, Petitioner, Lloyd Schlup, by and through counsel, and petitions this Court for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. In support of his petition, Petitioner states:

1. Petitioner is presently confined in the Potosi Correctional Center in Mineral Point, Missouri, pursuant to a conviction of capital murder and sentence of death entered on March 3, 1986, in the St. Charles County Circuit Court Cause No. CR 185-927FX, after a trial by jury.

2. Petitioner is innocent of the homicide for which he was sentenced to death. His conviction is a direct result of the constitutionally ineffective assistance of trial counsel, who failed to discover and present to the jury

persuasive, direct evidence of petitioner's innocence, consisting of more than a dozen eye-witnesses to the stabbing of Arthur Dade who can clear Petitioner and name the parties actually responsible for Dade's death.

3. These witnesses were not presented to the court during proceedings on Petitioner's First Amended Petition for Writ of Habeas Corpus because counsel therein, Mr. David Howard, ignored repeated requests by Petitioner and his mother, Ms. Nancy Slater, to locate and interview several of these eye-witnesses and to conduct other reasonable investigation. On numerous occasions Mr. Howard was asked to interview Lamont Griffin-Bey, Ricky McCoy, Robert O'Neal, Rodney Stewart, Gary Sonnenberg and others who saw or may have seen the fight that ended in the stabbing of Arthur Dade. On each occasion, counsel complained that the court was not paying his fees or expenses, and that he could not afford to spend the time and resources required to do the investigation.

4. Mr. Howard has further stated that he was intimidated by the personal involvement in Petitioner's case on the part of the former Chief Justice of the Missouri Supreme Court, William H. Billings, who made an ex parte phone call to the state post-conviction hearing judge arbitrarily ordering no further continuances in the post-conviction proceedings. Mr. Howard has had past dealings with the St. Charles County Circuit Court in which he successfully litigated meritorious allegations of judicial misconduct, and he has suffered many professional and personal repercussions as a result. Judicial retalliation [sic] for his representation in that case included disciplinary proceedings initiated by the circuit

court, which Mr. Howard had to defend at great personal expense. To this day, he does not practice law in St. Charles County. As a result, Mr. Howard was incapable of litigating the procedural issues in Petitioner's raised by the conduct of the Chief Justice of the Missouri Supreme Court and the Circuit Court of St. Charles County.

5. The ends of justice would be defeated by attributing to petitioner the inaction of his counsel. Petitioner and his mother have done everything possible to prove his innocence and obtain the assistance necessary to call the court's attention to the fact that there are a number of eye-witnesses to the murder who can establish his innocence. He has included the names of several eye-witnesses in every pro se pleading he has ever filed; he has requested every attorney who has ever represented him to interview these witnesses and present their testimony to the court. Furthermore, the failures of his attorneys are directly attributable to government interference with his counsel.

6. On January 5, 1989, Petitioner filed in the U.S. District Court for the Eastern District of Missouri his original *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. He included therein a claim that his trial attorney was ineffective for failing to interview and call as witnesses Lamont Griffin-Bey, Van Roberson, Robert O'Neal, and Rodney Stewart.

7. On March 7, 1989, Mr. Howard filed Petitioner's amended petition with the Court.

8. On September 5, 1989, Petitioner moved the District Court for funds to employ an investigator and to

conduct an evidentiary hearing. This request was denied on September 14, 1989.

9. On November 21, 1989, the Court entered a final Order denying Petitioner's request for habeas corpus relief.

10. Notice of Appeal to the District Court of Appeals was filed on December 19, 1989, and the appellate brief was filed on April 20, 1990.

11. The United States Court of Appeals for the Eighth Circuit denied Petitioner's appeal from this Court on July 22, 1991.

12. The United States Court of Appeals for the Eighth Circuit denied petitioner's Request for Rehearing and Rehearing En Banc on October 9, 1991. Petitioner's timely-filed Petition for Writ of Certiorari is pending in the United States Supreme Court.

13. Petitioner's Suggestions in Support of Petition for Writ of Habeas Corpus, submitted herewith, are incorporated herein by reference.

GROUNDS FOR RELIEF

CLAIM NO. 1

PETITIONER'S CONTINUED INCARCERATION AND THE EXECUTION OF HIS SENTENCE OF DEATH VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER HAS OBTAINED NEWLY DISCOVERED EVIDENCE THAT ESTABLISHES HIS INNOCENCE OF THE HOMICIDE OF ARTHUR DADE, AND BECAUSE THE MISSOURI COURTS DENIED PETITIONER A MEANINGFULL OPPORTUNITY TO PROVE HIS INNOCENCE. FURTHERMORE, IT IS A VIOLATION OF THE EIGHTH AMENDMENT TO EXECUTE A PERSON WHO IS INNOCENT.

Appendix A, submitted herewith, contains the statements, testimony, and/or affidavits of Lamont Griffin-Bey, Ricky McCoy, Robert O'Neal, Donnie Trendley, Michael Riley, John Green, Michael Dunn, Rodney Stewart, Gary Sonnenberg, Emmett Nave, Stanley Price, Dave Corcoran, Darnell Duckett, Jack Babcock, and Joseph Beck, all of whom were present when Arthur Dade was stabbed. Each of these witnesses provides affirmative and direct proof that Petitioner was not involved in Dade's stabbing. The contents of Appendix A are incorporated by reference as though full set out herein.

It was unknown to Petitioner or his counsel at the time of his trial or R le 27.26 motion that Trendley, Riley, Green, Dunn, Stewart, Sonnenberg, Nave, Price, Corcoran, Duckett, Babcock and Beck actually saw the stabbing of Dade, and that if called to testify at petitioner's trial, all of these witnesses would have testified that Petitioner was not involved in the stabbing in any way.

Counsel for the state was aware that O'Neal, Trendley, Riley, Green and Dunn had testified in the trials of Robert O'Neal and Rodney Stewart that petitioner was not involved in the stabbing of Arthur Dade, but did not communicate this fact to Petitioner or his counsel.

Prison officials were aware that Griffin-Bey and McCoy were shown photographs by investigator George Brooks that included a photograph of Petitioner. Both Griffin-Bey and McCoy pointed to Petitioner's photograph and indicated that he was not involved in the stabbing of Dade. Although a cryptic account of the interviews were included in the discovery provided to trial counsel, this fact was never disclosed to the defense.

CLAIM NO. 2

PETITIONER WAS DEPRIVED OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT A REASONABLE INVESTIGATION IN THAT HE FAILED TO INTERVIEW, INVESTIGATE OR CALL SEVERAL WITNESSES AT TRIAL WHO COULD HAVE TESTIFIED THAT PETITIONER WAS NOT PRESENT AT THE SCENE OF THE HOMICIDE OF ARTHUR DADE. A REASONABLE INVESTIGATION WOULD HAVE DISCLOSED THE EXISTENCE OF THESE WITNESSES BECAUSE PETITIONER REQUESTED HIS TRIAL ATTORNEY TO INTERVIEW SEVERAL OF THEM; COMPLIANCE WITH PETITIONER'S REASONABLE REQUEST WOULD HAVE LED TO THE DISCOVERY OF THE BALANCE OF THESE WITNESSES. FURTHERMORE, COUNSEL WAS PROVIDED DISCOVERY WITH RESPECT TO SOME OF THESE WITNESSES WHICH INDICATED THAT THEY WERE PRESENT AT THE SCENE AND OBSERVED THE STABBING. PETITIONER WAS PREJUDICED BECAUSE HE WAS DEPRIVED OF AN OPPORTUNITY TO CONCLUSIVELY ESTABLISH HIS INNOCENCE OF THE OFFENSE.

Appendix A, submitted herewith, contains the statements, testimony, and/or affidavits of Lamont Griffin-Bey, Ricky McCoy, Robert O'Neal, Donnie Trendley, Michael Riley, John Green, Michael Dunn, Rodney Stewart, Gary Sonnenberg-Emmett Nave, Stanley Price, Dave Corcoran, Darnell Duckett, Jack Babcock, and Joseph Beck, all of whom were present when Arthur Dade was stabbed. Each of these witnesses provides affirmative proof that Petitioner was not involved in Dade's stabbing.

Petitioner asked his trial attorney to interview several of these witnesses, and informed him that they could establish that he was not at the scene of the crime. Trial counsel failed to contact any of Petitioner's witnesses. Trial counsel made no effort to interview inmates who were present at the scene of the offense, even though he had in his possession statements and transcripts which indicated that a number of inmates actually witnessed the stabbing. The contents of Appendix A are incorporated by reference as though full set out herein.

CLAIM NO. 3

PETITIONER'S CONVICTION AND SENTENCE VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY INVESTIGATE, OBJECT TO, AND REBUT THE TESTIMONY OF THE STATE'S KEY WITNESSES, CORRECTIONAL OFFICER MAYLEE AND CORRECTIONAL OFFICER FLOWERS. A REASONABLE INVESTIGATION WOULD HAVE REVEALED THAT EACH OF THESE WITNESSES HAD GIVEN PREVIOUS TESTIMONY IN DEPOSITION AND IN THE TRIALS OF CO-DEFENDANTS O'NEAL AND STEWART, AND SUCH PRIOR TESTIMONY WAS SO CONTRADICTORY WITH THEIR TESTIMONY AT PETITIONER'S TRIAL THAT THE PRIOR TESTIMONY COULD EFFECTIVELY IMPEACH AND REBUT THE TESTIMONY GIVEN IN PETITIONER'S CASE. PETITIONER WAS PREJUDICED BECAUSE THE STATE'S CASE DEPENDED EXCLUSIVELY ON THE BELIEVABILITY OF THESE TWO WITNESSES.

The State's only witnesses linking Petitioner to the offense were Corrections Officers Flowers and Maylee.

Both witnesses testified in previous proceedings against Robert O'Neal and Rodney Stewart, and that testimony is set out in Appendix D, submitted herewith. This testimony contains many serious inconsistent statements by both Flowers and Maylee regarding important aspects of the case.

One example of prior testimony that should have been used in Petitioner's trial is the fact that Flowers stated in an interoffice memo written the day of the offense and testified in the trial of Rodney Stewart that Petitioner fled in the opposite direction from the dining room. Appendix D, Exhibit 2D, p. 85. In Petitioner's trial, he testified that he did not see where Petitioner went. (Trial transcript, p. 244). A video tape taken by the dining room surveillance camera revealed that Petitioner was the very first inmate in line for lunch on the day Dade was stabbed. This is a material inconsistency because if Flowers' testimony from the Stewart trial is true, then the video tape is compelling evidence that Flowers identification of Petitioner as a perpetrator is mistaken.

With respect to Maylee, the issue at Petitioner's trial was whether he could even see the scene of the stabbing from his position on the upper walk. (See Trial transcript, p. 350). Trial counsel's attempt to make this point to the jury failed because he relied *only* on the portions of Maylee's deposition testimony that were read into evidence. (Maylee was allegedly unavailable to testify due to alleged health problems). At petitioner's trial, the deposition testimony used placed Maylee standing on the uppermost walk looking through a barred wall. (Trial Transcript, p. 335). At Stewart's trial, he testified that he had to squat near the floor behind a stairway and look

between the steps to see the fight. (Appendix D, Exhibit 4D, p. 235). In an inter-office memo, Maylee stated that he was standing at the lever box that controlled the cell doors on the fourth level of the walk when the fight began. Appendix D, Exhibit 3D, p. 282. Visibility would not have been unobstructed from any of these points, but it is questionable whether the scene of the fight is visible at all from the lever box. (Appendix D, Exhibit 3D, p. 293).

Appendix D contains many other inconsistencies and independent facts that trial counsel should have used to impeach or rebut the testimony of Maylee and Flowers. The contents of Appendix D are incorporated herein by reference.

CLAIM NO. 4

PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN THE STATE OF MISSOURI FAILED TO DISCLOSE MATERIAL, EXCULPATORY EVIDENCE TO THE DEFENSE. THE STATE OF MISSOURI KNEW OF SEVERAL WITNESSES WHO COULD TESTIFY THAT PETITIONER WAS NOT INVOLVED IN THE MURDER OF ARTHUR DADE; HOWEVER, THE STATE FAILED TO DISCLOSE THIS FACT TO THE DEFENSE. THIS EVIDENCE INCLUDED, BUT IS NOT LIMITED TO, THE FACT THAT AT LEAST TWO WITNESSES WERE SHOWN PHOTOGRAPHS OF PETITIONER AND INDICATED THAT HE WAS NOT INVOLVED IN THE ALTERCATION. THE STATE ALSO FAILED TO DISCLOSE TO DEFENSE COUNSEL THE FACT THAT IN THE PRESENCE OF COUNSEL FOR THE STATE, FIVE ADDITIONAL WITNESSES TESTIFIED IN THE TRIALS OF ROBERT O'NEAL AND RODNEY STEWART THAT MR. SCHLUP WAS NOT PRESENT AT THE SCENE OF DADE'S STABBING.

Investigators employed by the state of Missouri interviewed Lamont Griffin-Bey and Ricky McCoy in regard to the stabbing of Arthur Dade. Griffin-Bey and McCoy were shown photographs of three suspects in the homicide of Arthur Dade. Both witnesses indicated with respect to Petitioner's photograph that he was not involved in the homicide. However, the discovery provided to defense counsel failed to advise him of the identity of the persons in the photographs, and further failed to advise the defense that each witness referred to a photograph of Petitioner and stated that he was not present at the scene of the crime. Appendix A, Exhibits

1A and 3A. Furthermore, the elected prosecutor, Mr. Tom Brown, was present in the courtroom during the trials of Robert O'Neal and Rodney Stewart, and heard Robert O'Neal, Donnie Trendley, Mike Riley, John Green, and Michael Dunn testify that Petitioner was not involved in the killing of Arthur Dade. Nevertheless, the prosecution failed to advise Petitioner's counsel of the existence of these witnesses or the substance of their testimony. Appendix A, Exhibits 4A, 6A, 7A, 8A, and 9A. The contents of Appendix A are incorporated by reference as though fully set out herein.

* * *

WHEREFORE, petitioner respectfully requests that this Court:

(a) Grant petitioner's Rule 60(b)(6) motion and allow petitioner to consolidate the litigation of all of his claims regarding the constitutionality of his conviction and sentence of death;

(b) Grant petitioner discovery and leave to gather additional evidence in support of his claims;

(c) Grant petitioner an evidentiary hearing and an opportunity to present witnesses, and other evidence in support of his claims;

(d) Continue the Stay of Execution presently in effect pending litigation of these claims; and

(e) Grant other and further relief that the Court may deem just and proper.

Respectfully submitted,

MISSOURI CAPITAL
PUNISHMENT
RESOURCE CENTER

Sean D. O'Brien, #30116

500 East 52nd Street
P.O. Box 22609
Kansas City, MO 64113-2609
816/235-2383
FAX 816/235-5239

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

No. 4:92CV00443(JCH)

RESPONSE TO ORDER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED

Comes now respondent, by and through counsel, and states as follows in response to this court's order to show cause why petitioner's petition for writ of habeas corpus should not be granted.

* * *

Statement as to "Actual Innocence"

Petitioner attempts to support his allegation of factual innocence by affidavits from ten inmates who now allege that petitioner was not involved in the murder of Arthur Dade. Although these inmates have now come forward some eight years later, with the assistance of petitioner's counsel, four of these inmates were questioned shortly after the incident by prison investigators and stated that they did not witness the stabbing (Resp.Ex. T, pp. 15, 29, 30, 32, 59). It is amazing how some eight years later they now graphically recall that petitioner was not involved in the stabbing. It is no wonder that the Eighth Circuit Court of Appeals noted that affidavits of inmates are viewed with skepticism. *Hall v. Lockhart*, 806 F.2d 165, 168 (8th Cir. 1986). Inmates have nothing to lose by perjuring themselves in affidavits. *Id.*

This appears to be the case in which numerous inmates, including those now themselves on death row, attempt to come forward and allege that petitioner was not involved.[4] Respondent also questions the motives of petitioner's co-defendants (O'Neal and Stewart) who have now signed affidavits alleging that petitioner was not involved in the stabbing. These affidavits are self-serving because co-defendant O'Neal's affidavit that petitioner was not involved supports O'Neal's self-defense theory forwarded and rejected during his trial. Likewise, Stewart's affidavit that petitioner was not involved is self-serving because it supports his defense forwarded at trial that he was not involved in the stabbing of Dade. Likewise, affidavits of Emmett Nave, Dave Corcoran, and Darnell Duckett are suspect since these individuals were not housed in the same walk in which the stabbing occurred. Moreover, *ALL* the affidavits are vague in that they do not allege that petitioner was not involved but merely allege that they did not *SEE* petitioner in the area.

Recently the Eighth Circuit addressed the issue of actual innocence. In *Cornman v. Armontrout*, No. 91-1718 (8th Cir. March 24, 1992), the Eighth Circuit Court of

---

[4] Respondent also questions the propriety of raising this "factual innocence" allegation in his present petition for writ of habeas corpus. Petitioner never attempted to raise this claim in his previous petition for writ of habeas corpus filed with this court. The Fifth Circuit Court of Appeals has recently suggested that the failure to raise the claim of actual innocence in a previous petition for writ of habeas corpus may in and of itself constitute an abuse of the writ. *See Ellis v. Collins*, 956 F.2d 76, 80 (5th Cir. 1992).

Appeals held that the burden of establishing "the fundamental miscarriage of justice exception to the cause and prejudice test" is upon the petitioner. Slip. at 7 n.6. The court further held that "[t]o make such a showing, a petitioner must do more than merely call into question the reliability of an adjudication of legal guilt." Slip. at 8, *quoting Murray v. Carrier*, 477 U.S. 478, 479 (1986). In order to establish actual innocence, the court held that a petitioner:

> must "show a fair probability that in light of all the evidence, *including that alleged to have been illegally admitted* (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt."
>
> *Kuhlman v. Wilson*, 477 U.S. 436, 455 n.17 (1986) (plurality) (emphasis added) (quoting *Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 160 (1970) (footnote omitted)); *see also Gullett v. Armontrout*, 894 F.2d 308, 310 (8th Cir.),. *cert. denied*, 110 S.Ct. 2213 (1990) (applying plurality opinion in *Kuhlman*).

Cornman v. Armontrout, supra, slip op. at 8. The court held that Cornman had not met "the stringent requirement" by merely claiming that testimony from his sister, his girlfriend, and the boyfriend of one of his sisters was wrongly excluded. Slip at 8.

Furthermore, petitioner raised a claim of actual innocence in his previous petition for writ of habeas corpus and on appeal to the Eighth Circuit in an attempt to

overcome his procedural default in state court. Petitioner alleged that trial counsel's failure to present the testimony of Robert O'Neal, Van Robinson, Lamont Griffin and Rick McCoy was not procedurally barred because it resulted in the conviction of one who is actually innocent. Petitioner alleged that the testimony of O'Neal, Robinson, Griffin and McCoy would have established that petitioner could not have been involved in the murder."

The Court of Appeals rejected petitioner's attempt to overcome the procedural default by injecting his claim of actual innocence holding that "[T]he district Court, however, concluded that Schlup could not demonstrate such injustice" (Resp.Ex. P, p. 4, n.5).

Petitioner attempts to relitigate his claim of actual innocence under a new theory. Petitioner's allegation that the affidavits would establish that no rational trier of fact could have found petitioner guilty fails for several reasons. First, the attempt to relitigate the claim of actual innocence would be foreclosed by the district court's and Eighth Circuit's earlier holding that petitioner is not actually innocent. Petitioner cannot raise a new theory of actual innocence simply because the first theory failed. Moreover, the Court of Appeals noted that petitioner's argument during trial was that "he was innocent of the murder, and he thought to establish that he was not present at the time and place of the offense" (Resp.Ex. P, p. 11). Thus, petitioner's affidavits do not establish actual innocence but is merely cumulative to his trial defense. In fact, the court held that the testimony of additional alibi witnesses would merely have been "repetitive" (Resp.Ex. P, p. 12). The court also found that:

> In light of the numerous aggravating circumstances, including convictions for assault and involvement in a murder while incarcerated, the undeveloped testimony would not have been of sufficient weight to have changed the outcome of Schlup's trial. (Resp.Ex. P, p. 12).

Petitioner now attempts to allege that these additional affidavits which he now presents establishes his innocence. However, since petitioner's claim of actual innocence has been previously rejected by both the district court and the Court of Appeals in petitioner's first round of habeas corpus proceedings, petitioner cannot attempt to reinvigorate his previously rejected claim of actual innocence. Moreover, petitioner has not alleged why he could not have raised this claim during his nearly eight years of litigating this matter. *Cf. Gomez v. U.S. District Court*, No. A-767 (U.S. April 21, 1992) (noting that prisoner could have raised claim in previous rounds of litigation). Petitioner establishes no good reason for this abusive delay.

Furthermore, if petitioner attempts to raise this claim as newly discovered evidence, this claim must fail. A claim of newly discovered evidence is not cognizable as an independent ground for relief.[5] *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). *See also, Evans v. Muncy*, 916 F.2d 163, 165-66 (4th Cir. 1990); *Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992), *cert. granted, stay denied*, 112 S.Ct. 1074 (1992). Moreover, petitioner has not

---

[5] Respondent questions the claim that this is newly discovered evidence since petitioner alleged a similar claim during his first petition.

shown that counsel breached a duty by failing to interview and investigate or call additional witnesses at trial who would have testified that petitioner was not present at the scene.[6] The Court of Appeals addressed this issue when it found that additional alibi witnesses would have been merely "repetitive" (Resp.Ex. P, p. 12). Likewise, the claim that counsel failed to investigate petitioner's background and mental health and counsel failed to investigate the facts and circumstances presented by the state in the penalty phase, were also resolved by the Court of Appeals (Resp.Ex. P, p. 12).[7] Since these issues were adversely decided against petitioner, he cannot now attempt to relitigate these claims.

Nor can petitioner establish that counsel breached a duty in failing to investigate, object to, or rebut the testimony of two correctional officers.[8] The testimony of the two correctional officers was not so significantly different from that presented at the co-defendant's trial to warrant a finding that counsel's conduct was unreasonable. Counsel extensively cross-examined Roger Flowers during trial

---

[6] The Eighth Circuit Court of Appeals also noted that this claim was procedurally barred from review since petitioner did not raise the claim in state court (Resp.Ex. P, p. 9). Likewise, any claim that trial counsel failed to interview the additional ten inmates is also procedurally defaulted since it was not raised in state court. *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); *Gilmore v. Delo*, 908 F.2d 385 (8th Cir.), *cert. denied*, 111 S.Ct. 20 (1990).

[7] This claim was also held to be procedurally barred by the Eighth Circuit (Resp.Ex. P, p. 9).

[8] As previously stated, this claim is procedurally barred by petitioner's failure to raise the claim in state court. *Smith v. Murray, supra; Gilmore v. Delo, supra.*

(Trial Transcript – hereinafter "Tr." – at 260-283, 286-87, 289-291, 293-294). Counsel further attempted to discredit the statements of John Maylee by establishing contradictions between Flowers' and Maylee's testimony (Tr. 490). Counsel further testified at petitioner's Rule 27.26 evidentiary hearing that he was aware of Maylee's and Flowers' testimony presented at the co-defendant's trial and determined the best strategy was to discredit their testimony by establishing the contradictions (27.26 Evidentiary Hearing Transcript – hereinafter "E.Tr." – at 76).

Petitioner also raises two claims alleging that the prosecutor failed to disclose exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).[9] Petitioner alleges that inmates Griffin and McCoy were shown photographs by investigator Brooks, and that both Griffin and McCoy pointed to petitioner's photograph and told Brooks petitioner was not involved.

Although petitioner has submitted affidavits from inmates Griffin and McCoy, affidavits signed years after the murder and with the help of petitioner's present counsel, neither Griffin or McCoy's affidavits allege that they were shown a photograph of petitioner or that they told officials that petitioner was not involved. Thus, the state had no information from Griffin and McCoy to disclose.

---

[9] Again, this claim is procedurally barred by petitioner's failure to raise the claim in state court. *Smith v. Murray, supra: Gilmore v. Delo, supra.*

Petitioner also alleges that the prosecutor failed to disclose the file from petitioner's previous conviction for the assault of Larry Wickizer.[10]

Petitioner has not shown that a violation under *Brady* has occurred. "*Brady* does not oblige the government to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence." *United States v. McKenzie*, 768 F.2d 602, 608 (5th Cir. 1985) (citations omitted), *cert. denied*, 474 U.S. 1086 (1986). "When evidence is available equally to the defense and the prosecutrix the defendants must bear the responsibility for their failure to diligently seek its discovery." *Id.*, citing *United States v. Milstead*, 671 F.2d 950, 953 (5th Cir. 1982); see also *Herrera v. Collias, supra.*

Since trial counsel was aware of the testimony give [sic] at the co-defendants trial (E.Tr. 76), there was no *Brady* violation for not disclosing the testimony. Likewise, the prosecutor was not obligated to disclose the entire file from petitioner's previous conviction for assault. See *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Furthermore, petitioner fails to allege that the file from the previous conviction contained favorable information or that the prosecutor had knowledge of any favorable information contained in the file.[11] He further fails to allege that he did not personally possess the

---

[10] Again, this claim is procedurally barred by petitioner's failure to raise this claim in state court. *Smith v. Murray, supra; Gilmore v. Delo, supra.*

[11] Richard Callahan was assigned as a special prosecutor during petitioner's trial for the murder of Arthur Dade. Mr. Callahan did not prosecute petitioner for the assault of Larry Wickizer.

information in the file or that counsel did not have access to the information from the previous counsel. Therefore, petitioner's petition for writ of habeas corpus should be denied.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

/s/ Frank A. Jung
FRANK A. JUNG
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI – EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443JCH

(Filed January 19, 1993)

TRAVERSE

COMES NOW Petitioner, by and through counsel, and states as follows in reply to respondent's Response To Order To Show Cause Why Writ Of Habeas Corpus Should Not Be Granted:

I. PETITIONER'S THRESHOLD SHOWING OF INNOCENCE

As anticipated by petitioner in his Suggestions in Support of Petition for Writ of Habeas Corpus (hereafter "Suggestions"), the State has interposed a defense of abuse of the writ. In his response to the Court's order to show cause (hereinafter "Response"), pages 3-8, respondent provides an incomplete summary of the abuse of the writ doctrine, as recently modified in the United States Court decision of *McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). Respondent omits the legal doctrine discussed in that opinion which is most applicable to petitioner's situation:

> Although the 1966 revision to the habeas statute eliminated any reference an "ends of justice" inquiry, a plurality of the Court in *Kuhlmann v. Wilson*, 477 U.S. at 454, held that this inquiry remained appropriate, and *required* federal courts to entertain successive petitioner when a petitioner supplements a constitutional claim with a "colorable showing of factual innocence."

> The miscarriage of justice exception to cause serves as "an additional safeguard against compelling and [sic] innocent man to suffer an unconstitutional loss of liberty," [citation omitted], guaranteeing that the ends of justice will be served in full.

McCleskey v. Zant, 113 L. Ed. 2d at 545 (emphasis added). The Court's obligation to entertain a successive petition where there is a "colorable showing of factual innocence" was specifically retained by the Court. Omitted from respondent's summary of the doctrine of the abuse of the writ is the fact that even if a petitioner cannot show cause, the failure to raise a claim or present evidence in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim. *Id.*[1]

No attempt is made by respondent to discuss the controlling precedent in the Eighth Circuit, *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985) (en banc), in which the court held that a prisoner satisfies his obligation to make a "colorable claim of innocence" where the petitioner

---

[1] Respondent suggests in footnote 4, page 11 of his response that a failure to raise to claim of actual innocence in a previous petition may "in and of itself constitute an abuse of the writ." Respondent relies on the fifth circuit case of *Ellis v. Collins*, 956 F.2d 76 (5th Cir. 1992), for this novel proposition. This is not an accurate statement of the holding in that case. The holding in that case was that although Ellis argued his actual innocence, he could not establish a constitutional violation. Similarly, *Gomez v. United States District Court*, 503 U.S. ___, 112 S. Ct. 1652 (1992), relied upon by respondent, has nothing to do with a claim of factual innocence. Petitioner's case is substantially different.

tenders evidence which is "sufficiently credible to deserve the attention of a jury." *Id.* at 949, n.7.[2] Respondent has avoided discussing the exception to the abuse of the writ defense set out in controlling United States Supreme Court cases, and in the eighth circuit cases of *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991), *modified and aff'd*, 935 F.2d 586 (8th Cir. 1992), and *Walker v. Lockhart, supra*. Petitioner refers the court to pages 1-8 of his Suggestions for a correct discussion of the law that applies to the threshold showing of innocence that petitioner has made.

A. THE PRISONER WITNESSES ARE TELLING THE TRUTH

Respondent's discussion of the substantial evidence of petitioner's innocence is extremely cursory and unconvincing. He seems to rest his primary argument on the fact that many petitioner's witnesses are prisoners, and that "affidavits of inmates are viewed with skepticism." (Response p. 11). Respondent's reliance on *Hall v. Lockhart*, 806 F.2d 165, 168 (8th Cir. 1986), should be viewed in the factual context of that case, which is substantially different from petitioner's. Hall's legal claim rested exclusively on the affidavits of his co-defendants, one who recanted his trial testimony against Hall, and the

---

[2] Although the United States Supreme Court has recently modified the standard for "actual innocence" of a death sentence, it did not modify the test for actual innocence of an offense. "In the context of a non-capital case, the concept of 'actual innocence' is easy to grasp." *Sawyer v. Whitley*, ___ U.S. ___, 112 S. Ct. 2514, 2520, 120 L. Ed. 2d 269, 281 (1992).

other who was prepared to testify that Hall did not participate in the murders. Rather than addressing the issue of prisoners in general, the court stated that "*recantation* by *convicted co-defendants* is viewed with a considerable element of skepticism. . . . " *Id.* at 168. The court expressed the view that "such evidence should be supported, where possible, by additional and independent evidence." *Id.* Robert O'Neal and Rodney Stewart are not "recanting" any prior statement with their affidavits; neither prisoner has ever said that Mr. Schlup was involved in the crime, and neither testified against him at his trial. Furthermore, the affidavits of all of the prisoners all quite consistent with one another, and are corroborated by substantial independent physical evidence, including a videotape of a surveillance camera, petitioner's own statement corroborated by physical evidence, and substantial inconsistencies in the prosecution's evidence.[3]

Respondent dismisses the witness affidavits that establish Petitioner's innocence because they were made by inmates, some of whom told prison investigators that

---

[3] Judge Wollman dissented from the holding of the court with respect to the inmate affidavits because the inmate affidavits were consistent with the statement that Hall made to the police at the time of his arrest. 806 F.2d at 169. Petitioner also made an exculpatory statement to prison investigators consistent with the evidence he has tendered to the Court. Petitioner's statement is corroborated not only by the other prisoners and the video tape, but by the absence of blood on the clothes he was wearing at the time of his arrest. He also told investigators that he hurried to lunch so he could play handball afterward, and he had his handball in his pocket when he was arrested in the dining room. Also, petitioner's cell is the closest cell to the dining room.

they did not see the stabbing. Respondent also argues that several of the inmates are not to be believed because they resided on walks other than 1 Walk, where the murder occurred. This argument reveals his lack of familiarity with the trial evidence and with the scene of the crime; several of the inmates who assisted in loading Dade onto the stretcher and carrying him to the hospital were not housed on 1 Walk. Furthermore, the walks above 1 Walk were also released for lunch, and prisoners on those walks had to use the common stairway between Housing Units 5A and 5B to get to the hall leading to the dining room.[4]

Although some of Petitioner's witnesses told prison investigators that they did not see the murder,[5] respondent fails to discuss any of the circumstances surrounding the murder and the investigation that explain the reluctance of prisoners to admit to being a witness to the crime. Prisoners who saw the crime were aware that had they admitted seeing it, they would have been pressured by prison officials to "snitch" against the people who

---

[4] Respondent seems to forget that one of his star witnesses at trial, John Maylee, claimed to have seen the event from one of several walks above 1 walk, although there is some inconsistency in his testimony as to which walk he was on.

[5] Respondent fails to point out that Respondent's Exhibit T reveals much that supports Petitioner's innocence. For example, Lamont Griffin-Bey told prison investigators that he knew they had O'Neal and Stewart charged with the crime, "but they ain't got this guy right here." When asked how he knew they didn't have him, Griffin-Bey said, "Because I know who they got." Respondent's Exhibit T, pp. 33-34.

committed the murder. This particular stabbing heightened racial tensions in the prison because it was rumored to be a "hit" of an African-American inmate (Dade) by members of the Aryan Brotherhood, a white-supremacist prison gang. Many witnesses whose statements are recorded in respondent's Exhibit T refer to the racial tension in the prison as the reason for not wanting to answer questions.[6] When Maurice Ford was asked whether the possibility of further retaliation made him tense, he replied, "oh, hell yes." (Exhibit T, p. 19). He still refuses to discuss the matter with anyone. Joe Beck heard rumors about African-American prisoners retaliating for Dade's death. (Respondent's Exhibit T, p. 17). Many inmates took the safest course of action, which is simply not to be a witness.

Respondent neglects to tell the Court that Exhibit T also includes statements of inmate witnesses who did see the murder. Darnell Duckette (incorrectly referred to as "Duffy" in Exhibit T) stated that he saw the murder. For some incredible reason, he was not asked what he saw, even after he admitted he saw it. He said that he did not know the name of the person who stabbed Dade, but he was not asked to make a photo identification of any of the suspects. (Exhibit T, pp. 52-53). Similarly, respondent fails

---

[6] " . . . sometimes you see or don't see that's the best way to stay healthy, you see what I'm saying . . . " interview of inmate Van Roberson, Respondent's Exhibit T, p. 15. Based on Roberson's statement, and the fact that he has been released from prison, Petitioner believed he would be likely to provide reliable testimony establishing Petitioner's innocence. Counsel learned from Roberson's mother that he died about three years ago.

to mention that Jack Babcock admitted that he saw Flowers take Stewart into custody. (Exhibit T, pp. 59-60).

Respondent's Exhibit T provides a great deal of insight into the inability of prison officials to conduct a thorough investigation into occurrences such as this. Although the stabbing occurred in a crowded cell block, only Lamont Griffin-Bey and Ricky McCoy were willing to name the persons involved in the stabbing.[7] Counsel's experience has been that prisoners who are unwilling to talk to prison guards will sometimes talk freely with a defense attorney. In this case, it is practically certain that a number of prisoners who said they did not see the murder were not being truthful, either out of fear of reprisal or hostility towards the prison administration, or both. A thorough review of respondent's Exhibit T reveals that very few of the persons interviewed could fairly be characterized as cooperative, nor could the questioning be fairly described as probing. There are a number of reasons that a rational person would choose not to cooperate in a pending murder investigation in a state penitentiary. Traditional notions of reliable factfinding require that a witness who has made a prior inconsistent statement be confronted with that statement and given an opportunity to admit, deny or explain the prior inconsistent statement or the circumstances under which it was made. *See. e.g., State v. Dent*, 473 S.W.2d 370 (Mo. 1971). Respondent complains about his lack of opportunity to cross-examine these witnesses; Petitioner would

[7] Neither of them put the petitioner at the scene of the crime.

be glad to provide him that opportunity at an evidentiary hearing.

Petitioner has attempted to locate and re-interview as many of these prisoners as possible, but several have not yet been located, some are deceased, and many continue to refuse to talk. Of those who have chosen to discuss the stabbing, all have said that they either witnessed the stabbing, and Mr. Schlup was not present at the scene, or they did not see the stabbing at all. Not a single prisoner has said that he saw Petitioner present at the scene.

B. RESPONDENT'S EXHIBIT T SUPPORTS PETITIONER'S INNOCENCE.

Respondent's Exhibit T contains much that supports Petitioner's innocence, but two very critical facts stand out. First, it proves that Lamont Griffin-Bey, a Black Muslim, provided a statement that is consistent with his more recent statement that Petitioner was wrongly accused of this crime. Given the racial overtones of this case, it is highly unlikely that he would give false evidence to clear a man accused of participating in a racially motivated stabbing of an African-American prisoner by members of a white supremacist organization. Second, Exhibit T reveals that a prisoner, John Green, stated:

> "I stepped out of the office and I heard Sgt Flowers calling for officers cause they had a fight. Couldn't get nobody so *he told me to call base to notify them of the fight and that's what I did.*"

Exhibit T, p. 31. This is crucial evidence because it dramatically increases the probative value of the video-tape.

This is a law suit where innocence can be established by the accurate determination of time, distance and speed. The video-tape showing Petitioner waiting to be served lunch in the prison dining room was the prosecution's biggest obstacle to obtaining a conviction. The video shows Petitioner alone at the head of the line for several minutes before he is joined by other inmates and the serving line is opened. The tape shows that he had been in the dining room for several minutes when the guards ran past the dining room window in response to the call that was put out over the prison radio. Trial counsel, Gene Bushmann, believed that the video tape was persuasive, if not conclusive, evidence of his client's innocence. However, the prosecution dealt with the video-tape by breaking the events into two time frames: The time between the stabbing and Mr. Schlup's arrival in the dining room, and the time between the stabbing and the radio broadcast of the stabbing. The strategy was to shorten the first time frame as much as possible, so that Mr. Schlup would have time to commit the murder and still be first in line for lunch, but to lengthen the second time frame, to show that there was plenty of time for Schlup to go through the serving and begin eating his lunch before the call went out to the guards.

To shorten the first critical time period, the prosecution sent an investigator, George Brooks, to the housing unit to determine how much time it took to get from the scene of the crime to the dining room. The guard testified that it took him one minute and 37 seconds talking normally, one minute and three seconds walking rapidly, and 33 seconds running. (Tr. pp. 465-466). The Court should note, however, that no one testified that Petitioner was

seen running. At trial, two prisoners testified that they walked down to lunch behind Petitioner, and Officer Faherty testified that at one point, Petitioner even stopped to shout out of a window to a prisoner out in the yard. Faherty had to tell him to move along. Also significant is the fact that Flowers testified in the trial of Rodney Stewart that the prisoner he identified as Petitioner ran past him toward the locked end of the walk, in the opposite direction from the stairs, which means that the real culprit took substantially longer to get to the dining room. If he got there at all, he would have arrived at or near the same time as Robert O'Neal, who also fled in that direction and then ran to the dining room. O'Neal was about fifteenth in line for lunch.

To lengthen the second time frame, the prosecution presented testimony that the call to which the guards responded must have been put out by Captain Eberle because he was the first guard with a walkie-talkie to arrive at the scene. Under the prosecutor's theory, Sgt. Flowers wrestled Stewart into custody, gave instructions to inmates who were at the scene, then took Stewart downstairs to the control center, where he told Captain Eberle there was a fight. Captain Eberle went up the stairs,[8] found Dade lying on the floor and then called for help on his walkie-talkie. Since none of the other corrections officers in the area were equipped with walkie-

---

[8] It is interesting that Captain Eberle estimated that, responding to an emergency situation, it would take forty five seconds to a minute to get up the stairs leading into Housing Unit 5A, (Tr. 214-215), a small fraction of the total distance from the scene of the stabbing to the dining room that Investigator Brooks testified that he could run in 33 seconds. (Tr. 465).

talkies, the prosecutor represented to the jury that no call had been broadcast earlier. (Tr. 212-13). Thus, according to the prosecutor, Petitioner had ample time to participate in the stabbing, go through the serving line and begin eating his lunch, but still have time to have committed the murder. (Tr. 482-487). Green's statement that he made the call at Flowers' direction before any other officer arrived at the scene flatly refutes the prosecutor's theory of the case – it means that the call went out within seconds of the stabbing, and that therefore the guards who were seen running from the dining room in response to Green's call establish a time frame which makes it physically impossible for Petitioner to have been present when the crime took place. Green's statement is not likely to have been fabricated; at the time of his interview, neither he nor anyone else could have realized the significance of his having made the call to base as the crime was in progress.

Another significant fact revealed in respondent's Exhibit T is that the murder did not happen immediately after the cell block was opened. Sergeant Flowers indicated that the procedure for releasing prisoners to the dining room is that he would open the master level, which opened all of the doors on the individual cells, and he would leave them open for a couple of minutes until the inmates stepped out of their cells, and then he would close the doors again. The prisoners did not immediately head for the dining room because, as Arthur St. Peter said, "Let me explain something, the reason I do stay in front of that cell is because I want to come back and see that everything is there." (Respondent's Exhibit T, p. 20). Even waiting for the doors to close, St. Peter, Ricky

Easley, and petitioner were the first three prisoners into the dining room, as indicated on the surveillance videotape.[9]

It is clear that several prisoners made it down the stairs to the dining room before the fight broke out. Gary Riley, who occupies cell 75 in Housing Unit 5A, which is the fourth cell down from the end of 2 Walk which is farthest from the stairs to the dining room, made it part way down the stairs before he heard the fight, and turned around and ran back up to see Dade fall on the floor. (Respondent's Exhibit T, p. 1). Likewise, William Falston, who occupied the cell next to Riley, was going down the steps when he heard Flowers call for assistance, and he, too, went back up the stairs and saw Dade on the floor. Riley and Falston were among the inmates who helped put Dade on the stretcher and rush him to the hospital. In fact, Falston states that he and the other inmates "ran [Dade] to the hospital in an attempt to save his life." The video surveillance tape, which is made by means of a single machine that is hooked to several cameras, shows that petitioner has already been served his lunch as Dade is being carried away from Housing Unit 5 on a stretcher.

---

[9] This is also consistent with the fact that these three prisoners occupied the cells that were closest to the stairway leading down to the dining hall, as indicated by the diagram of Housing Unit 5A, which will be filed with this court under seal as agreed with the Attorney General.

II. THERE IS CAUSE FOR PETITIONER'S INABILITY TO DISCOVER AND FULLY LITIGATE THE CLAIMS PRESENTED HEREIN DURING HIS STATE POST-CONVICTION PROCEEDING IN HIS PREVIOUS PETITION FOR WRIT OF HABEAS CORPUS.

Petitioner agrees with respondent that *McCleskey v. Zant*, 111 S. Ct. 1454, obliges a habeas petitioner to conduct a "reasonable and diligent investigation aimed at including all relevant claims in grounds for relieve [sic] in the first federal habeas petition." *Id.* at 1472. However, respondent completely fails to address the fact that there was no opportunity for such an investigation to take place in this case, and the lack of opportunity is due to the actions of government officials. The affidavits of Mr. Mark Kempton, petitioner's counsel in his Missouri Rule 27.26 proceedings, and Mr. David Howard, petitioner's counsel in his previous habeas corpus petition, are very explicit in this respect.

Mr. Kempton's nine-page affidavit sets forth in detail the conduct of state officials that frustrated his attempt to conduct a diligent investigation into the constitutionality of Mr. Schlup's conviction and sentence. The obstacles he encountered include the following:

> 1. Although Mr. Kempton was appointed in late June of 1987, to represent Mr. Schlup, the Missouri Supreme Court issued warrants ordering petitioner's execution on July 21, August 20, October 15, and November 1, 1987, necessitating the preparation of four motions to stay the execution. Each motion required a signed certification from the circuit court judge.

> 2. The state refused to file any responsive pleading, or even assign a prosecutor to the case, or communicate with Mr. Kempton about petitioner's case until October 9, 1987.
>
> 3. On October 30, 1987, while under a warrant of execution for November 1st, Mr. Kempton appeared in the circuit court of Cole County, Missouri, before the Honorable Judge Donald E. Dalton, and attempted to make a record detailing the events prior to that date and requesting a continuance for the purpose of conducting additional investigation. The request for a continuance was denied, and in an in chambers conference on that morning, the circuit court judge told Mr. Kempton that if he did not proceed, he would be held in contempt and sent to jail, and other counsel would be appointed and forced to conduct the hearing as scheduled that morning.

See Mr. Kempton's affidavit, Exhibit 1C.

Mr. Kempton states that "because of the aforementioned events, I was precluded from performing my duties as described in Rule 27.26 of conducting a diligent investigation into claims that could have been reasonably discovered." (Affidavit, p. 9). Mr. Kempton explains in his affidavit that he has extensive experience in representing clients in felony criminal litigation and civil litigation in Missouri courts, but that he was quite surprised by the circuit court's response to his motion for continuance:

> "Based on years of trial and appellate practice in the State of Missouri, and based upon the amount of time that an attorney can reasonably expect to have to investigate and prepare cases,

> I had no reason to anticipate that in a death penalty case there would be less opportunity to investigate and prepare for the hearing than would be allowed in a typical lawsuit involving far less serious stakes." (Affidavit, p. 8).

At another point he states:

> "As counsel for Mr. Schlup, I fully expected adequate time to research, investigate and prepare my client's defense in this death penalty case, as has been my experience in civil and felony criminal cases that I have been involved with. I was quite surprised by the court's response to the motion for continuance I filed on Mr. Schlup's behalf." (Affidavit, p. 5).

On pages 6, 7 and 8 of his affidavit, Mr. Kempton describes the investigation that he would have performed had he been given an adequate opportunity, i.e. had the circuit court allowed him additional time to conduct discovery and investigation, had the state's counsel communicated with him in a timely fashion, and had his time not been monopolized by the necessity to seek stays of execution at thirty-day intervals during the litigation. He noted that the transcripts of the questioning of inmates by investigators Brooks and Dearixon reveal that several inmates saw the stabbing of Arthur Dade, but "the questioning of the investigators was so shallow that it cannot be determined from their interviews whether these witnesses would have implicated or exonerated Lloyd Schlup." (Affidavit, p. 6). He also describes much of the penalty phase investigation that he would have conducted if given an opportunity, and that in his extensive experience in similar investigations in criminal and civil cases, "it typically requires several months to obtain a

reasonably complete set of medical records." (Affidavit, pp. 6-7).

A factor very closely related to the issuance of numerous execution warrants and the denial of Mr. Kempton's request for continuance is the telephone call that Judge Dalton received from Missouri Supreme Court Chief Justice William J. Billings. Ms. Mary Hudson, then a paralegal with the Missouri State Public Defender's office, has provided this court with an affidavit explaining that Judge Dalton told her that he wanted to withdraw a document that he had signed and submitted to the Missouri Supreme Court certifying that additional time was needed beyond the November 1st execution date to resolve Mr. Schlup's post-conviction motion.[10] Judge Dalton told Ms. Hudson in a telephone conversation on October 23, 1987 that he had received a call from Missouri Supreme Court Chief Justice William Billings not to grant a continuance and to "keep their feet to the fire." Ms. Hudson in her sworn affidavit states that she spoke with both Judge Dalton and Judge Rush, who were very concerned about the call they had received. Judge Dalton expressly stated he would just rather let Judge Billings handle the whole situation regarding stays and hearings. (Hudson Affidavit, p. 2). Although the state has not

---

[10] The procedure that was followed in petitioner's Rule 27.26 litigation was that the Missouri Supreme Court would issue a warrant of execution for a certain date, and it would stay that execution only if the circuit judge before whom the case was pending would certify that additional time was necessary to resolve the case. At the same time the Missouri Supreme Court would issue a stay of execution, it would set a new execution date for the near future.

denied that petitioner's continuance motion was resolved in this *ex parte* manner without him or Mr. Kempton having an opportunity to plead his case, petitioner has provided this court additional affidavits of other attorneys, a newspaper article quoting a Kansas City psychiatrist, and has referred the court to a finding of a United States District Judge that Chief Justice Billings engaged in similar conduct in other cases. (See Petitioner's Appendix C, and Petitioner's Suggestions, pp. 42-43, quoting Smith by and through *Smith v. Armontrout*, 632 F. Supp. 503, 507, n.7 (W.D. Mo. 1986)). [Footnote omitted]

The issuance of numerous execution warrants and the denial of Mr. Kempton's motion for continuance are due to circumstances independent of petitioner or his counsel, and were precipitated by the conduct of government officials. Although respondent can be counted on to quote book, verse and chapter on procedural default, respondent seldom acknowledges that the federal court's deference to state judgments that rest on procedural grounds depends upon the state's "*good faith attempts* to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). *(emphasis added)*. The Court also stated " 'in appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). In the circumstances of petitioner's case, it would be just as easy to argue that the conduct of state officials constitutes cause for his failure to discover or fully litigate his constitutional claims at a full and fair hearing in state court. *See e.g., United States ex rel. Gladney v. Peters*, 790 F. Supp.

1364, 1369-1370 (N.D. Ill. 1992), holding that where state supreme court precedent clearly indicates that it would be futile to present a constitutional claim challenging a constitutional defect in a standard jury instruction, the adverse precedent constituted cause which excused the failure of post-conviction counsel to appeal the denial of Gladney's post-conviction motion. In petitioner's case, the cause is even more direct, where the Chief Justice of the State Supreme Court rendered a request for adequate time within which to conduct a reasonable investigation futile by his *ex parte* contact with the state circuit court judge.

* * *

When petitioner filed his petition for writ of habeas corpus in the United States District Court, very little investigation had been done into his guilt or penalty phase defense by either trial counsel or post-conviction counsel. In order to discover and litigate the claims that are presented in this petition, an attorney would have to conduct a diligent investigation, and be prepared to challenged the state court procedures that were used to thwart petitioner's attempt to challenge the constitutionality of his conviction and sentence. Mr. David Howard, who is appointed to represent petitioner in those proceedings, has provided the court with an affidavit very candidly explaining his fear of pursuing the matters set out in the affidavits of Mr. Kempton and Ms. Hudson. Respondent merely states that he cannot comprehend how "a federal habeas counsel may be intimidated by a state court judge during federal habeas corpus proceedings." (Response, p. 7). Mr. Howard's affidavit explains this in direct terms:

I expected retaliation if I used these facts to supply the external factor at that time. I found reasons not to implicate the state judiciary in charges of misconduct, believing that I had sufficient, independent legal grounds to obtain full relief otherwise. My hesitancy stemmed from prior experience in confronting state judges with charges of constitutional infringements of individual rights.

* * *

In 1977 an allegation of professional misconduct was lodged against me by a Missouri circuit court judge after I filed a federal civil rights action challenging his circuit court's practice of incarcerating children in adult jails without lawful procedures. Although I ultimately prevailed with an injunction in the federal suit, I still had to obtain counsel to defend myself in a protracted proceedings before the Missouri Bar Administration. I strongly believe that my client suffered reprisals from the state judges and argued that in the Missouri Supreme Court. Indeed, a judge was finally disciplined for his conduct toward my client, *In the Matter of Buford*, 577 S.W.2d 809 (Mo. banc 1979).

I have also heard lawyers express outrage at the intemperate remarks and unfair treatment they received from Judge Billings. I did not want to join his list of victims by using the information about Judge Billings' overreaching in regard to Schlup's post-conviction relief. In retrospect, my fear of reprisal from this powerful jurist chilled my ability to advance all of Schlup's arguments that could have unleashed meritorious claims from the procedural bar. This fear, coupled with

> the district court's denial of an evidentiary hearing and funding to hire an investigator to pursue facts that may have obviated the need to confront Judge Billings, I believe was fatal to full and fair development of a record during Schlup's 1989 habeas corpus proceeding.
>
> Throughout the course of my representation of Lloyd E. Schlup, he has consistently maintained his innocence. He persisted in attempting to focus counsel's efforts on the guilt phase of his trial.

(Howard Affidavit, pp. 3-5). Indeed, Mr. Howard's fears seem well grounded. Judge Hungate reacted very strongly to the allegations surrounding the Missouri post-conviction proceedings in a manner that was personally critical of counsel. At a conference on petitioner's Rule 60(b) motion, counsel for the state suggested that, in light of Mr. Howard's affidavit, the appropriate remedy (in lieu sparing petitioner's life) to refer Mr. Howard to the Missouri Bar Disciplinarian Committee for appropriate action.

The truth is that Mr. Howard's anxiety about performing the duties necessary to effective [sic] represent Mr. Schlup were the direct results of the unconscionable procedures used by the Missouri courts to deprive Mr. Schlup of a full and fair hearing on his state post-conviction motion. This clearly distinguishes Mr. Schlup's case from those situations referred to in *McCleskey v. Zant, supra*, in which it is deemed to be fair to attribute the negligence of the lawyer to the client.

None of the attorneys who represented petitioner at trial, during state post-conviction, or at his previous

habeas proceeding spoke to any of the witnesses that Mr. Schlup claimed should have been called to testify at his trial. From the beginning, the State of Missouri has characterized these witnesses as "additional alibi witnesses." Although petitioner's defense at trial was alibi, and the defense was strongly corroborated by a videotape made by the dining surveillance camera, it is misleading to characterize these new witnesses as "alibi witnesses." If petitioner had been granted an opportunity to present the testimony of these witnesses, it would become clear that, they would establish petitioner's innocence because they were present at scene of the crime, and could testify that petitioner was not there. There is no question that Robert O'Neal and Rodney Stewart were present at the scene of the crime, and that they could divulge the names of others who were also present. In fact, some of the prisoners who were present at the scene of the crime had already testified in the trials of O'Neal and Stewart before petitioner was brought to trial. Donnie Trendley testified that he saw the stabbing, and that petitioner was not on the walk when the crime took place. He did not see petitioner until he walked into the dining room, and petitioner was already there. (Appendix A, Exhibit 6, p. 3). Mike Riley, John Green and Michael Dunn also testified at previous trials that they saw the stabbing, but they did not see petitioner at the scene of the stabbing.

Interviews of the these readily discoverable witnesses would have revealed the names of additional people who were present and saw the crime. Furthermore, a reading of the statement of Joseph Beck, summarized in respondent's Exhibit T, leads inescapably to the conclusion that he was present, and probably saw the stabbing,

and his protestation that he did not see the stabbing occur is simply the predictable reluctance of a prisoner in a maximum security unit to cooperate with the prison administration in a pending murder investigation. Once it could be determined that a person was present at the scene, regardless of whether that person admits to having seen the murder, a reasonable investigation would require that counsel talk to that person to determine who else may have been present. Had that been done, then counsel would have discovered that Emitt Nave, Stanley Price, Dave Corcoran, Darnell Duckette and Jack Babcock, as well as Joseph Beck, witnessed the murder and could exonerate petitioner. Because no one contacted any of these witnesses, petitioner's *pro se* claim that counsel was ineffective for failing to call witnesses who could prove that he was not present at the scene of the crime, and naming Robert O'Neal, Rodney Stewart, Lamont Griffin-Bey and Ricky McCoy as witnesses who should have been interviewed, was completely misconstrued as merely "an alibi" defense. Even through the last reported opinion on petitioner's previous habeas corpus petition, the court described this claim as being "that trial counsel was ineffective in not calling additional alibi witnesses." *Schlup v. Armontrout*, 941 F.2d 631 (8th Cir. 1991). At this point, when the court made this statement, no witness had been interviewed, and no hearing had been held on this ground. Thus, all prior determinations on this claim, whether on procedural or substantive grounds, have been made in a factual vacuum. Without addressing any of the threshold procedural issues on claims involving evidence of Mr. Schlup's innocence, the Eighth Circuit Court of Appeals went directly to the testimony of Mr. Schlup's

trial counsel at the state Rule 27.26 hearing in which he provided strategy reasons for failing to interview and call Robert O'Neal, Van Robinson, Lamont Griffin-Bey and Ricky McCoy in petitioner's defense. Although Mr. Bushmann stated that he reviewed discovery in trial transcripts before making that decision, Mr. Bushmann was given an opportunity to review the statements and affidavits submitted to this court, some of which are set out in respondent's Exhibit T. After reviewing these materials, Mr. Bushmann provided an affidavit to this court in which he states that:

> "Affiant has never seen or been provided any oral or written statements by any inmate who was present in the housing unit at the time of Arthur Dade's stabbing who admitted to having seen the homicide or who stated that Mr. Schlup was not involved;
>
> Affiant has never seen or been provided by any person any oral or written statement by Lamont Griffin-Bey or Ricky McCoy that he observed the homicide of Arthur Dade or that he had personal knowledge that Mr. Schlup was not involved in the homicide or [sic] Arthur Dade;
>
> The State of Missouri did not advise Affiant, nor was Affiant aware, that Mr. Gary Sonnenberg, Mr. Darnell Duckette and Mr. Jack Babcock made statement to prisoner investigator George Brooks that they had seen the homicide of Arthur Dade." (Affidavit, pp. 1-2).

Mr. Bushmann states that if he had been aware of the existence of these witnesses, he "most certainly would have interviewed them and called them to testify in Mr. Schlup's defense." It is clear that the newly discovered

evidence presented herein completely undercuts the basis for the prior denial of petitioner's petition for relief.

Respondent cites *Williams v. Lockhart*, 862 F.2d 155, 158 (8th Cir. 1988), for the proposition that petitioner must "demonstrate new facts or new legal developments warranting litigation of the claim." (Response, p. 10). In directing the court's attention to this legal standard, respondent completely fails to recognize that petitioner *has* demonstrated new facts and new legal developments warranting litigation of the claims presented herein. The new facts have been extensively discussed in petitioner's Suggestions, and are further discussed below in relation to each particular claim. The legal developments, which respondent completely ignores, are set out in petitioner's Appendix F, which document petitioner's intervening attempts to invoke state remedies that have traditionally been available to persons in his procedural posture and circumstances. These new facts, and the refusal of the Missouri Supreme Court to extend to petitioner the protections of the writ of habeas corpus guaranteed under the Missouri Constitution, art. I, § 12, place this petition in a completely different factual and legal context than the previous petition. Furthermore, in relying upon *Williams v. Lockhart*, 862 F.2d 155, respondent fails to discuss the balance of the holding in that case, in which the court held:

> We agree with *Williams* that it would be unfair to dismiss his "new" claims because they were not included in the prior habeas petition if the previous petition was filed and litigated without his knowledge, participation, or authorization [footnote omitted]. "The concept of 'abuse of the

> writ, is founded on the equitable nature of habeas corpus." (*Citing Kuhlmann v. Wilson*, 477 U.S. 436, 444 (1986)). Rule 9(b) is targeted at those writs that constitute "needless piecemeal litigation," or those whose purpose is to "vex, harass, or delay." [citation omitted] . . . the rule cannot so far as to bar a new application filed by a petitioner who did not in fact consent, either expressly or by implication, to the previous habeas petition filed by his trial counsel. Accordingly, we remand this case and direct the district court to determine whether the "new" constitute an abuse of the writ in light of Williams's now clarified assertion that he did not authorize the first habeas petition. 862 F.2d at 160.

In this case, Mr. Howard filed the amended petition, which the district court denied, without first consulting with petitioner, and without investigating the claims that petitioner specifically requested that he investigate. The observations of Chief Judge Lay in his separate concurring opinion apply directly to petitioner's case:

> I concur in Judge Bowman's excellent opinion. However, under the circumstances of this case, where counsel acted on his own in filing the first habeas petition in federal district court without consultation or advice from petitioner, the discretionary rule of 9(b) governing successive petitions is simply not germane to our consideration. To invoke such a rule would in my judgment necessarily create a procedural callousness and ignore equitable principles relating to habeas corpus. 862 F.2d at 161.

Mr. Howard has admitted that he did not meet with petitioner before amending the habeas corpus petition,

and that he never conducted the investigation that petitioner specifically requested that he do. Judge Lay's observations apply directly to petitioner:

> To suggest that prisoners might hold back to play procedural games with the court is unrealistic. I have never been aware of such prisoner stratagem in a habeas case. In sounds good in principle as a means of thwarting the undesirability of piecemeal appeals, but it simply does not happen. There is no empirical evidence that it occurs. The presumptive desirability to achieve one's freedom is far too great to "sandbag" the court for procedural fun. 862 F.2d at 161.

Judge Lay's observations accurately describe Mr. Schlup's position and conduct throughout this litigation. He is completely without fault for any the circumstances that have resulted in the previous unreliable adjudications of the constitutionality of his conviction and sentence.

In making his conclusory argument that petitioner has not demonstrated actual innocence that would overcome the procedural barriers that respondent has asserted, respondent relies on a passage from *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), as cited in *Cornman v. Armontrout*, 959 F.2d 727 (8th Cir. 1992):

> "In order to establish actual innocence, the court held that a petitioner:
>
> > must show a fair probability that in light of all the evidence, *including that alleged to have been illegally admitted* (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial,

> the trier of facts would have entertained a reasonable doubt of his guilt."

Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986) and *Cornman v. Armontrout*, 959 F.2d at 730 (Respondent's emphasis). After acknowledging this legal standard, respondent completely fails to answer the allegations that petitioner has made regarding the unreliability of the evidence that was introduced against him at trial. Respondent completely fails to deny the numerous inconsistencies in the state's case, discussed in detail in petitioner's Suggestion, pages 8-20. In fact, the only reference that respondent makes to the strength of the evidence at trial is to argue that it was a reasonable trial strategy for trial counsel to base his entire defense on the inconsistencies of the state's case-in-chief:

> Counsel extensively cross-examined Roger Flowers during trial [citation omitted]. Counsel further attempted to discredit the statements of John Maylee by establishing contradictions between Flowers' and Maylee's testimony (Tr. at p. 490). Counsel further testified at petitioner's Rule 27.26 evidentiary hearing that he was aware of Maylee's and Flowers' testimony presented at the co-defendant's and determined the best strategy was to discredit their testimony by establishing the contradictions.

(Response, p. 16). Aside from admitting the existence of inconsistencies and contradictions, respondent makes no other attempt to address the weakness of the state's case at trial. Respondent also fails to deny that trial counsel failed to use the *additional* impeachment material that could have been used to further diminish the credibility

of the state's witnesses. (See Petitioner's Suggestions, pp. 24-31).

It is difficult to imagine a more compelling "colorable claim of factual innocence" that than presented in this case. Petitioner contends that this preliminary discussion of the evidence clearly entitles him to an evidentiary hearing and a merits ruling on the constitutional violations that he has presented this court in his petition for writ of habeas corpus. While respondent made very little effort to deal with petitioner's claims individually in his response, petitioner will briefly address each individual claim below.

* * *

WHEREFORE, petitioner prays this court to grant an evidentiary hearing on the allegations herein, and thereafter issue the writ of habeas corpus and grant further relief that the court may deem just and proper.

Respectfully submitted,

/s/ Sean O'Brien
Sean O'Brien #30116
MISSOURI CAPITAL PUNISHMENT RESOURCE CENTER
500 East 52nd Street
Post Office Box 22609
Kansas City, MO 64113-2609
(816) 235-2383
Fax: (816) 235-1008

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 JCH

(Filed June 7, 1993)

SUPPLEMENTAL MOTION FOR EVIDENTIARY HEARING

COMES NOW Petitioner, by counsel, and moves this Court for an evidentiary hearing on his Petition for Writ of Habeas Corpus, and on the procedural issues relating thereto. For his motion, Petitioner states:

1. Petitioner has filed with this Court a Petition for Writ of Habeas Corpus raising numerous issues of fact, including the fact of his innocence, the fact that there is substantial mitigating evidence that should have been presented to the sentencer, and the fact that there is cause for his inability to discover or litigate these questions during his state post-conviction proceedings and his previous Petition for Writ of Habeas Corpus. All of these facts can be established through the testimony of first-hand witnesses, including the fact of Petitioner's innocence.

2. The claims set out in the Petition for Writ of Habeas Corpus were duly presented to the Missouri Supreme Court in a Petition for Writ of Habeas Corpus pursuant to Missouri Rule 91, Chapter 532 of the Missouri Revised Statutes, and Article I, section 12 of the Missouri Constitution.

3. The Missouri Supreme Court denied Petition a full and fair hearing on any of his claims. Indeed, the

Missouri Supreme Court did not provide Petitioner any form of hearing at all. Instead, the Court summarily denied Mr. Schlup's petition without making any findings of fact or conclusions of law, even though Petitioner alleged sufficient facts under Missouri law to invoke the Habeas Corpus jurisdiction of the court.

4. Petitioner has submitted numerous affidavits of witnesses whose testimony establishes his innocence, and this testimony is corroborated by a video tape taken by a prison surveillance camera. Although the video was shown to the jury at trial, additional information has been discovered that now makes the video conclusive proof of Petitioner's innocence. This testimony falls into two categories: (1) Eyewitnesses to the stabbing who establish that Petitioner was not at the scene, and (2) Eyewitnesses to events that prove that events captured on the video tape fix a time frame for the commission of the stabbing that makes it impossible for Petitioner to have been present at the scene. This category of evidence includes the statement of inmate clerk Joe Green made *before* the discovery of the video tape that he alerted the prison control center to the assault on Arthur Dade *as the assault was happening*. It also includes the affidavits of several prisoners who heard the commotion on the cell block, and *simultaneously* saw guards running from the direction of the dining room toward the cell block. Since the video tape shows that Mr. Schlup was standing outside the dining room for some time before the guards ran out in response to the call, he could not have been involved in the fight. Counsel will be submitting in the near future a supplemental motion to expand the record,

which will include the affidavits of several new witnesses to these events.

5. Counsel has attempted to reconstruct the occupancy of Housing Unit 5 on the date of the stabbing, and is attempting to locate as many of the potential witnesses as is humanly possible. This would have been a relatively simple task at the time of trial, but it is somewhat difficult and time consuming at this point, although it can be done. This has been a labor-intensive and time-consuming process, and is not yet complete.

6. Counsel is aware of the State's desire to expedite this case, and suggests that the most effective manner in which to comply with the recommendation of the Eighth Circuit Court of Appeals in *Rust v. Clark*, 960 F.2d 72, 73 (8th Cir. 1992), is to follow the procedures set out in Eastern District Local Rule 13(B) regarding scheduling and planning of complex civil cases. This matter is equally (if not more) important to Counsel's client, and Counsel has done his best to give this case the priority it deserves, given Counsel's other professional obligations to other clients and other matters. In the next 60 days, counsel has a traverse due in a death penalty habeas corpus case in the Western District of Missouri, and will be relocating his offices. Counsel was recently appointed in another death penalty habeas corpus case in the Eastern District of Missouri which Respondent also wishes to have expedited, and was personally assigned by the State Public Defender to represent a death-sentenced prisoner in a state Rule 29.15 motion, which involves rigid and jurisdictional time limits. Counsel respectfully suggests that the best way to avoid chaotic litigation in this case is

to set a schedule that accounts for the other demands on the time and resources of the parties.

WHEREFORE, Petitioner moves this court for:

A. An evidentiary hearing on his Petition for Writ of Habeas Corpus;

B. An opportunity to discuss with the court and opposing counsel the scheduling of an evidentiary hearing;

C. An opportunity to appear in person before the Court and formally argue the merits of Petitioner's motions now pending before this Court;

D. Such other relief as the Court deems just and equitable.

MISSOURI CAPITAL
PUNISHMENT RESOURCE
CENTER

/s/ S. D. O'Brien
Sean D. O'Brien

500 East 52nd Street
P.O. Box 22609
Kansas City, MO 64113-2609
816/235-2383
FAX 816/235-5239

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 (JCH)

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITIONER'S MOTION FOR EVIDENTIARY HEARING

Comes now respondent, by and through counsel, and states as follows in opposition to petitioner's motion for evidentiary hearing.

Petitioner filed his third petition for writ of habeas corpus with this court on March 11, 1992. *See Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992) (treating Rule 60(b) motion as functional equivalent of second petition), *cert. denied*, 113 S.Ct. ___ (May 17, 1993). Petitioner's third petition raises claims of newly discovered evidence of actual innocence. Petitioner requests an evidentiary hearing to present testimony on his newly discovered evidence. In support of his request for evidentiary hearing, petitioner claims he is entitled to a hearing because he raised this issue in a state habeas corpus proceeding under Missouri Supreme Court Rule 91 and the Missouri Supreme Court summarily denied this issue his petition. Since petitioner has defaulted on his available state remedies on this claim, and because the claim is not reviewable as a matter of law, petitioner is not entitled to an evidentiary hearing.

Newly discovered evidence is not reviewable, as a matter of law, in a federal habeas corpus proceeding. *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Nor is a claim of newly discovered evidence of

actual innocence. *See Herrea* [sic] *v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In fact, *Herrera* held that newly discovered evidence of actual innocence are more appropriate for presentation in a request for executive clemency. *Id.* at 869. Since a claim of newly discovered evidence of actual innocence is not reviewable as a matter of law, petitioner's factual dispute need not be resolved.

Moreover, the Missouri Supreme Court's summary denial of petitioner's petition for writ of habeas corpus does not entitle petitioner to an evidentiary hearing in federal court. Petitioner's claim of newly discovered evidence of actual innocence was not raised within fifteen days after the verdict was returned. Missouri Supreme Court Rule 29.11(f); *Herrera v. Collins, supra*, 113 S.Ct. at 865 n.8. Petitioner's failure to raise this claim within fifteen days has resulted in petitioner defaulting on his available state remedies. *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 436 (1986); *Gilmore v. Delo*, 909 F.2d 385 (8th Cir.), *cert. denied*, 111 S.Ct. 20 (1990).

Although petitioner raised this claim to the Missouri Supreme Court in a petition for writ of habeas corpus, the Missouri Supreme Court denied petitioner's petition because claims of newly discovered evidence are not reviewable in a habeas corpus proceeding under Rule 91 was a matter of law. *Cf. State v. Johnson*, 286 S.W.2d 787, 795-96 (Mo. 1956) (affidavits of actual innocence "can only be presented in an action for executive clemency").

The summary denial of petitioner's petition for writ of habeas corpus does not remove the procedural default which occurred by failing to raise the claim within fifteen

days after the verdict. *See Byrd v. Delo*, 942 F.2d 1226, 1231-1232 (8th Cir.), *stay denied*, 112 S.Ct. 17 (1991); *Daniel v. Jones*, 944 F.2d 429, 430 (8th Cir. 1991). Therefore, although petitioner may have presented his claim of newly discovered evidence of actual innocence to the Missouri Supreme Court pursuant to a habeas corpus proceeding under Rule 91, the summary denial of this claim does not establish that he was denied a full and fair hearing in state court entitling him to an evidentiary hearing in federal court.

Furthermore, since petitioner's third petition for writ of habeas corpus is an abuse of the writ, this Court must resolve this "threshold" issue. *McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Any holding that petitioner is entitled to an evidentiary hearing in federal court on his claims of newly discovered evidence of actual innocence would also be barred under the retroactivity rules of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 104 L.Ed.2d 334 (1989).

Conclusion

WHEREFORE, for the reasons herein stated, respondent prays that this Court deny petitioner's motion for an evidentiary hearing.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

/s/ Frank A. Jung
FRANK A. JUNG
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 JCH

(Filed June 14, 1993)

SUPPLEMENTAL MOTION TO EXPAND THE RECORD

COMES NOW, petitioner, Lloyd Schlup, and respectfully moves this Court, pursuant to Rule 7 of the Rules Governing § 2254 Cases, to expand the record in this case by allowing petitioner to file additional affidavits in support of his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. sec. 2254. For his motion, Petitioner states:

1. Counsel has submitted herewith the affidavits of eight witnesses who have personal knowledge of facts that establish Mr. Schlup's innocence of the crime for which he has been sentenced to death. Attached hereto are the affidavits of the following individuals: Lamont Griffin Bey, Jack Babcock, Gary Sonnenberg, James Pierce, William Foster, Charles Ward, Donnell White, and Emmett Nave.

2. Affidavits of witnesses Griffin Bey, Nave, Babcock and Sonnenberg have already been submitted to this court. Counsel personally interviewed these witnesses, and obtained supplemental affidavits to address respondent's allegation that their previous affidavits that have been submitted to this court do not clearly establish petitioner's innocence or are not sufficiently detailed to be credible. Although counsel disagrees with respondent's characterization of the prior affidavits, counsel

believes that the supplemental affidavits adequately address this concern.

3. Foster, Pierce, Ward and White are witnesses who had not previously been interviewed, but they possess personal knowledge that substantiate petitioner's innocence. Each witness' affidavit indicates either that he saw the stabbing and Mr. Schlup was not involved, or that he saw prison guards running from the direction of the dining room toward the cell block and simultaneously heard the noise caused by the fight during which Dade was were [sic] stabbed. In conjunction with the videotape showing Mr. Schlup in the prison dining room as the guards rushed to the scene of the stabbing, these affidavits conclusively establish Mr. Schlup's innocence.

4. Counsel's investigation has revealed that there may be additional witnesses who were in a position to observe events relevant to petitioner's guilt or innocence. Counsel is diligently attempting to locate and interview these individuals, and expects to provide additional information to the court.

5. Counsel also intends to file additional exhibits with the court, including the floor plan of Housing Unit 5 (which by agreement will be filed under seal), and the videotape from the prison surveillance camera.

6. Consideration of the facts and testimony set out in the attached affidavits are critical to a just resolution of this cause.

WHEREFORE, petitioner respectfully moves that this court grant leave to expand the record herein to include the affidavits attached hereto, and for such other relief as the Court deems appropriate.

Respectfully submitted,

MISSOURI CAPITAL
PUNISHMENT RESOURCE
CENTER

/s/ S. D. O'Brien
SEAN D. O'BRIEN, #30116
500 East 52nd Street (64110)
Post Office Box 22609
Kansas City, Missouri 64113-2609
(816) 235-2383
FAX: (816) 235-1008

ATTORNEY FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 (JCH)

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITIONER'S MOTION TO EXPAND THE RECORD

Comes now respondent, by and through counsel, and states as follows in opposition to petitioner's motion to expand the record.

Petitioner filed his third petition for writ of habeas corpus with this Court on March 11, 1992. *See Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992) (treating Rule 60(b) motion as functional equivalent of second petition), *cert. denied*, 113 S.Ct. ___ (May 17, 1993). Petitioner's third petition raises claims of newly discovered evidence of actual innocence. Petitioner requests to expand the record by submitting eight affidavits from inmates who allege petitioner is actually innocent. Since petitioner has defaulted on his available state remedies on this claim, and because the claim is not reviewable as a matter of law, petitioner's motion to expand the record should be denied.

Newly discovered evidence is not reviewable, as a matter of law, in a federal habeas corpus proceeding. *Townsend v. Sain*, 732 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Nor is a claim of newly discovered evidence of actual innocence. *See Herrera v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In fact, *Herrera* held that newly discovered evidence of actual innocence are more appropriate for presentation and request for executive clemency. *Id.* at 869. Since a claim of newly discovered

evidence of actual innocence is not reviewable as a matter of law, petitioner's request to expand the record by submitting affidavits from inmates who allege that petitioner is actually innocent is not necessary in order for this Court to resolve petitioner's claim.

28 U.S.C. §2254, Rule 7(a) states that a court may expand the record by including "materials relevant to the determination of the merits of the petition." Since newly discovered evidence of actual innocence fails to plead a claim for which a ground for relief may be granted, the affidavits are unnecessary to rule on the issue presently before this court.

Furthermore, petitioner did not raise this claim in the state courts. Thus, petitioner has defaulted on his available state remedies. *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 97 L.Ed.2d 436 (1986); *Gilmore v. Delo*, 908 F.2d 385 (8th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 20, 111 L.Ed.2d 826 (1990); *Stokes v. Armontrout*, 893 F.2d 152 (8th Cir. 1989), *stay denied*, 495 U.S. 926, 110 S.Ct. 2162, 109 L.Ed.2d 492 (1990). Petitioner may not present additional evidence in federal court if that evidence has not been presented in state court. *Bolder v. Armontrout*, 921 F.2d 1359, 1362 (8th Cir. 1990), *cert. denied*, 112 S.Ct. 152 (1991), citing *Thomas v. Zant*, 697 F.2d 977, 988 (11th Cir. 1983) ("additional evidence federal court not allowed unless petitioner shows failure to present evidence to state court was not due to excusable neglect or deliberate bypass"); *see also Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). Petitioner's failure to present this evidence in state court prohibits petitioner from presenting this evidence in a federal habeas corpus proceeding.

Conclusion

WHEREFORE, for the reasons herein stated, respondent prays that this Court deny petitioner's motion to expand the record.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

/s/ Frank A. Jung
FRANK A. JUNG
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner,	)	Cause No. 4:92CV00443
v.	)	(Filed August 23, 1993)
PAUL DELO, Superintendent Potosi Correctional Center, Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court pursuant to Lloyd Schlup's Petition for Writ of Habeas Corpus. Also pending before the Court are Petitioner's Supplemental Motion for Evidentiary hearing, Petitioner's Supplemental Motion to Expand the Record and Respondent's Motion to Vacate Stay of Execution.

I. Background

On March 3, 1986, Petitioner Lloyd Schlup was convicted of the capital murder of Arthur Dade and sentenced to death by the St. Charles County Circuit Court. The murder took place on 1 Walk of Housing Unit 5-A of the Special Management Unit of the Jefferson City Correctional Center (JCCC)[1]. At the time of the murder, Petitioner and Arthur Dade were inmates at JCCC. In

[1] At the time of the murder, JCCC was known as the Missouri State Penitentiary.

separate trials, Robert O'Neal and Rodney Stewart were also convicted of the murder of Arthur Dade. *State v. O'Neal*, 718 S.W.2d 498 (Mo. banc 1986); *State v. Stewart*, 714 S.W.2d 724 (Mo. Ct. App. 1986).

Petitioner unsuccessfully appealed his conviction in state court. *State v. Schlup*, 724 S.W.2d 236 (Mo. banc 1987), *cert. denied* 482 U.S. 920 (1987). Petitioner also filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 27.26 (repealed 1988). The motion court denied relief and the Missouri Supreme Court affirmed. *Schlup v. State*, 758 S.W. 2d 715 (Mo. banc 1988). Petitioner subsequently filed a petition for writ of habeas corpus in federal court. The court denied the petition. *Schlup v. Armontrout*, No. 89-0020-C-3 (E.D. Mo. November 21, 1989) (unpublished opinion), *aff'd*, 941 F.2d 1062 (8th Cir. 1991), *cert. denied* 112 U.S. 1273 (1992). Immediately after his petition for writ of certiorari was denied by the United States Supreme Court, Petitioner filed a Motion for Reconsideration of the Judgment pursuant to Fed. R. Civ. P. 60(b)(6). The district court denied the Rule 60(b)(6) Motion on the ground that Petitioner's successive claims were untimely filed and Petitioner's new claims were best raised in a petition for writ of habeas corpus. *Schlup v. Armontrout*, No. 89-0020-C-3

(E.D. Mo. March 10, 1992)(unpublished opinion). Petitioner filed the instant petition on March 11, 1992.

Petitioner asserts the following seven claims in support of his petition: (1) Petitioner has newly discovered evidence that establishes his innocence of the murder; (2) trial counsel was ineffective because the failed to interview or call as witnesses several individuals who could

have testified that Petitioner was not present at the scene of the murder; (3) trial counsel was ineffective because he failed to investigate, rebut and object to the testimony of the state's key witnesses; (4) the prosecution failed to disclose material exculpatory evidence concerning Petitioner's involvement in the murder; (5) trial counsel failed to conduct a reasonable investigation into Petitioner's background and mental health; (6) trial counsel was ineffective because he failed to conduct an investigation into the facts and circumstances of the aggravating circumstances presented during the penalty phase of the trial; and (7) the prosecution failed to disclose exculpatory evidence concerning the aggravating circumstances. Claims 1, 3, 4, 6, and 7 are raised for the first time in the instant petition. [Hereinafter collectively referred to as "the new claims."] Claims 2 and 5 were raised in Petitioner's first habeas petition. [Hereinafter collectively referred to as "the successive claims."]

II. The New Claims

A. Standard

The majority of Petitioner's claims are raised for the first time in this petition. The Court may not consider claims raised for the first time in a successive habeas petition if the petitioner has "deliberately withheld the newly asserted ground or otherwise abused the writ." 28 U.S.C. § 2244(b). *See also* Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b). The Court may consider new claims raised in a successive petition if the petitioner can establish cause for not previously raising the claims and prejudice from his failure to

do so. *McCleskey v. Zant*, 111 S.Ct. 1454, 1470 (1991); *Shaw v. Delo*, 971 F.2d 181, 184 (8th Cir. 1992). To establish cause the petitioner must show that " 'some objective factor external to the defense impeded counsel's efforts' " to raise the claim in the first petition. *McCleskey*, 111 S.Ct. at 1454, 1470 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Claims that are barred by the cause and prejudice standard may be heard if Petitioner "can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." *Id.* The scope of the fundamental miscarriage of justice exception is narrow. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2519 (1992); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992). In *Sawyer*, the Supreme Court announced that the miscarriage of justice exception applies when the petitioner establishes by "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer*, 112 S.Ct. at 2517. The same standard also applies to habeas challenges to the conviction itself. *McCoy v. Lockhart*, 969 F.2d 649 (8th Cir. 1992). *See also Shaw v. Delo*, 971 F.2d 181, 185-86 (8th Cir. 1992); *Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992)(en banc).

B. Cause

The government bears the burden of pleading abuse of the writ. *McCleskey*, 111 S.Ct. at 1470. Respondent in the instant case has set forth Petitioner's writ history, identified the new claims in the instant petition and alleged that petitioner has abused the writ with respect to

those new claims. Thus, Respondent has satisfied his burden and the burden shifts to Petitioner to show cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition and prejudice resulting from his failure to do. *See id.*

Petitioner asserts three theories in support of his contention that he had cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition. First, Petitioner asserts that his counsel failed to permit him to participate in the litigation of his first petition. Second, Petitioner contends that the conduct of former Missouri Supreme Court Justice Billings intimidated his Rule 27.26 counsel and his first habeas counsel and prevented them from thoroughly investigating and presenting Petitioner's claims. Finally, Petitioner asserts that the State failed to disclose exculpatory evidence. None of these theories is persuasive.

Petitioner maintains that he was denied a meaningful opportunity to participate in the litigation of his first habeas petition.[2] Specifically, Petitioner contends that although he included the names of all known exculpatory witnesses in his *pro se* petition[3] and in his Rule 27.26 motion, no lawyer ever contacted these witnesses. Petitioner also states that his mother maintains a file of

---

[2] Insofar as Petitioner contends that this failure was due to conduct of Justice Billings, the Court's discussion in Section II.A.ii. of this Memorandum and Order, *infra*, applies.

[3] Petitioner filed his first petition for writ of habeas corpus *pro se*. The court appointed counsel to represent Petitioner and granted Petitioner's appointed counsel leave to file an amended petition.

documents concerning her son's case and that she has been frustrated in her attempts to have counsel pursue her suggested avenues of investigation.

In support of his contention that this alleged conduct constitutes cause, Petitioner cites *Williams v. Lockhart*, 862 F.2d 155 (8th Cir. 1988). In *Williams*, petitioner alleged that his trial counsel filed and litigated his first habeas petition without petitioner's knowledge or participation. *Id.* at 159. The court of appeals remanded the case to the district court for a determination of whether petitioner had consented to the previous habeas petition. The court stated:

> This is a critical question of fact, for Williams should not be allowed to accept [the attorney's] representation and then later disavow it. Conversely, he should not be bound by what [the attorney] did unless he somehow authorized or ratified [the attorney's] efforts on his behalf.

Id. A petitioner may consent to the actions of his attorney either expressly or by implication. *Id.*

In the instant case, Petitioner does not allege that the attorney who filed his first habeas petition acted without his knowledge or participation. Therefore, the reasoning of *Williams* is not applicable here. Nor can this element of Petitioner's argument succeed under the assumption that Petitioner has alleged that his habeas counsel was ineffective. Because there is no constitutional right to counsel in a habeas case, the ineffectiveness of habeas counsel does not constitute cause. *Coleman v. Thompson*, 111 S.Ct. 2546, 2567-68 (1991); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992).

Petitioner also maintains that Justice Billings contacted the Circuit Judge presiding over Petitioner's Rule 27.26 hearing and ordered him to deny all requests for extensions of time. In addition, Petitioner maintains that the Missouri Supreme Court issued numerous execution warrants against Petitioner during the pendency of his state post-conviction motion thereby requiring Petitioner's Rule 27.26 counsel to spend his time preparing motions for stay of execution rather than investigating Petitioner's case. Petitioner submits several affidavits in support of his contention that Justice Billings regularly admonished circuit judges presiding over capital cases not to entertain delays or grant continuances.

Assuming that Petitioner's allegations are correct, the Court finds that they do not constitute cause for Petitioner's failure to raise Claims 1, 3, 4, 6, and 7 in his previous habeas petition. The alleged difficulties encountered by Petitioner's state post-conviction relief counsel do not explain Petitioner's failure to include his new claims in his first federal habeas petition. Obviously, Justice Billings had no jurisdiction over the judge presiding over the federal habeas case. Nor does Petitioner allege that Justice Billings attempted to interfere with the federal habeas proceedings. By affidavit Petitioner's first federal habeas counsel states that he was reluctant to raise the issue of Justice Billings' conduct in the first federal habeas petition because he had previously experienced reprisals from state court judges after criticizing their conduct. The Court finds, however, that counsel's reluctance to risk the wrath of Justice Billings does not constitute an objective factor external to the defense and

therefore cannot constitute cause for Petitioner's failure to raise his new claims in his previous petition.

Petitioner maintains that state officials interfered with his ability to raise the new claims in his previous petition because they had exculpatory evidence in their possession and failed to disclose said evidence to Petitioner. In the portion of Petitioner's Suggestions addressing the merits of his constitutional claims, Petitioner develops his contention that the alleged withholding of this evidence interfered with his constitutional rights at the trial phase. However, Petitioner never develops his claim that the alleged failure to disclose exculpatory evidence to his trial counsel interfered with his ability to present all of his claims in his first habeas petition. Thus, the Court finds that these allegations do not constitute cause under the standard enunciated in *McCleskey*.

For all of the foregoing reasons, the Court concludes that Petitioner has not shown cause for his failure to raise his new claims in his prior habeas petition. Because Petitioner has not shown cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition, the Court need not consider whether he would be prejudiced by his inability to raise them in the instant case. *McCleskey*. 111 S.Ct. at 1474.

C. Miscarriage of Justice Exception

As previously noted, the Court must consider Petitioner's new claims if Petitioner establishes by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him guilty of the

murder of Arthur Dade or eligible for the death penalty under Missouri law.

Claim 1

Petitioner claims that his continued incarceration and imposition of the death penalty violate the due process clause of the Fourteenth Amendment because Petitioner has obtained newly discovered evidence that establishes his innocence. In addition, Petitioner claims that his execution would violation [sic] the Eighth Amendment ban on cruel and unusual punishment because it is unconstitutional to execute an innocent person.

The Court may only consider newly discovered evidence in a habeas proceeding when the evidence is directly relevant to the constitutionality of the petitioner's continued incarceration. *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Herrera v. Collins*, 113 S.Ct. 853, 860 (1993). "[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Townsend*, 372 U.S. at 317.

In the instant case, Petitioner maintains that the evidence is relevant to his claim that the execution of an innocent person would violate the Eighth and Fourteenth Amendments to the United States Constitution and therefore should be considered. Petitioner relies heavily on his claim of actual innocence and he submits as new evidence in support of that claim the affidavits of inmates who

assert that they witnessed the murder of Arthur Dade and did not see Petitioner at the scene.[4]

The Supreme Court has recently considered whether actual innocence is an independent ground for federal habeas corpus relief. *Herrera, supra.* Petitioner in *Herrera* claimed that he was scheduled to be executed for a murder he did not commit. Writing for the Court, Justice Rehnquist noted that actual innocence is not an independent constitutional claim but, rather, "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 862. *See also id.* at 869. However, the Court also stated:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the

---

[4] In his Supplemental Motion to Expand the Record, Petitioner seeks leave to introduce additional affidavits. The Court has reviewed those affidavits and concludes that although they are more detailed than the previously submitted affidavits, they do not change the Court's analysis of Petitioner's actual innocence claim. Therefore, Petitioner's Motion to Expand the Record will be denied.

> threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 869. Thus, it is appropriate for the court to consider whether Petitioner has made a persuasive showing of actual innocence.

Herrera supported his claim of actual innocence with affidavits wherein the affiants asserted that Herrera's since deceased brother committed the murder. The Court held that the affidavits were not sufficient to warrant relief on Petitioner's actual innocence claim. The Court noted that the affidavits were filed over eight years after petitioner's trial and stated that "there is something suspect about a defense witness who is not identified until after the 11th hour has passed." *Id.* at 869 (quoting *Taylor v. Illinois*, 484 U.S. 400 (1988)). *See also Bolder v. Delo*, 985 F.2d 941, 943 (8th Cir. 1993)(affidavits filed at the eleventh hour and over twelve years after the state trial are to be treated with skepticism); *Delo v. Blair*, 1993 U.S. LEXIS 4633 (July 21, 1993)(vacating stay of execution imposed by court of appeals even though petitioner submitted seven affidavits in support of his claim of actual innocence). The Court further discredited Herrera's affidavits because all but one of the affidavits consisted of hearsay and the affidavits did not present a consistent account of the murder. *Id.* at 869. The Court also stated that the affidavits must be considered in light of the proof offered at trial. *Herrera*, 113 S.Ct. at 870. Herrera had been convicted of murder on the strength of two eyewitness accounts, numerous pieces of circumstantial evidence and a handwritten note in which Herrera strongly implied that he was responsible for the murder. *Id.* at 872.

The affidavits presented by Petitioner do not suffer from all of the same infirmities that caused the Supreme Court to discredit the affidavits submitted by Herrera. The instant case is also distinguishable from *Herrera* in that Herrera was convicted on the basis of a larger quantity of evidence than was presented at Petitioner's trial. However, upon review of the transcript, Petitioner's new evidence, and the arguments of counsel, the Court finds that Petitioner has failed to make a persuasive showing of actual innocence. The affidavits submitted by Petitioner were all executed in the early months of 1992, approximately six years after Petitioner's state court trial. As previously noted, there is something suspect about affidavits produced after a long delay. *Herrera*, 113 S.Ct. at 872 (O'Connor concurring). Moreover, Petitioner's affiants are all fellow inmates who do not necessarily have a strong incentive to refrain from perjuring themselves. *See Hall v. Lockhart*, 806 F.2d 165, 168 (8th Cir. 1986). Considered in light of the positive identifications made by Officers Flowers and Maylee, the Court cannot say that these affidavits constitute a persuasive showing of actual innocence sufficient to warrant disruption of the state court's finding of guilt.

Claim 3

The States's primary evidence at trial was the eyewitness testimony of Corrections Officers John Maylee[5] and Lt. Roger Flowers. See TR at 234-94; 331-363. Petitioner

---

[5] The testimony of John Maylee was presented by deposition.

contends that Flowers and Maylee gave testimony in the trials of Petitioner's codefendants O'Neal and Stewart that was inconsistent with their testimony during Petitioner's trial. In addition, Petitioner maintains that the testimony of Flowers was inconsistent with the testimony of Maylee and that both witnesses offered testimony that was inconsistent with prior sworn statements. Petitioner contends that he was denied effective assistance of counsel because his trial counsel failed to adequately investigate, object to and rebut the testimony of Flowers and Maylee.

In his Suggestions, Petitioner details various inconsistencies between the accounts of the murder given by Officers Flowers and Maylee.[6] Obviously, these discrepancies were before the jury at the time of their deliberations. Moreover, Petitioner's trial counsel emphasized discrepancies between the testimony of Maylee and Flowers in his closing argument. TR. 495-96.

Petitioner also contends that the jury did not have the opportunity to consider certain inconsistencies between Officer Flowers' trial testimony and prior sworn

[6] For example, Officer Flowers testified that he saw Stewart walking toward Dade against the flow of inmates coming out of 1 Walk toward the cafeteria. TR. 242. Officer Maylee testified that he saw O'Neal, Schlup and Stewart running in the same direction. TR. 332.

statements.[7] However, upon review of these inconsistencies, the Court cannot say that they are material to a determination of Petitioner's guilt or innocence such that no reasonable juror would have convicted Petitioner had they been noted at trial.

Finally, Petitioner points to certain inconsistencies between the testimony of Officer Maylee and certain previous statements. According to Petitioner, these inconsistencies render suspect Maylee's contention that he was able to see the murder from his position three levels above the scene of the crime.[8] However, as Petitioner notes, trial counsel did address the visibility issue and "established . . . that Maylee's ability to view the scene from the top floor of the cell block was at least questionable." Suggestions, p. 26 n. 14 (citing TR. 193-205). The jury had the opportunity to consider the credibility of Maylee and to determine whether he was able to see all that he said he was able to see. The Court finds that the evidence relied upon by Petitioner is not so substantial that had it been introduced no reasonable juror would have credited Maylee's testimony.

[7] These inconsistencies concern whether Flowers saw Stewart hitting Arthur Dade in the face or in the stomach and whether Flowers saw Petitioner run toward the back of the hallway after the murder or whether he did not see where Petitioner went after the murder.

[8] The murder took place on 1 Walk of Housing Unit 5-A. 1 Walk is on the first floor of the prison. Maylee was stationed on 7-8 Walk which is on the fourth floor of the prison. Petitioner does not dispute that 1 Walk is visible from certain positions on 7 Walk.

Claim 4

As previously noted, Petitioner claims that the state failed to disclose material exculpatory evidence in its possession. Petitioner states that the prison's chief investigators interviewed Lamont Griffin-Bey and Ricky McCoy, two inmates who claimed to have witnessed the murder. Petitioner contends that when Griffin-Bey and McCoy were shown a photograph of Petitioner the witnesses indicated that Petitioner was not involved in the murder of Arthur Dade. In addition, Petitioner claims that several witnesses testified at the trials of Robert O'Neal and Rodney Stewart that Petitioner was not present at the scene of the murder. Petitioner contends that the state did not provide him with this information and the only information he received was "an incomplete transcript of cursory interviews with several inmates." Suggestions, at 75.

Review of the transcript indicates that Petitioner's trial counsel used portions of the transcript of both the O'Neal and the Stewart trials to impeach the testimony of Officer Flowers. TR. 267; 279; 281. In addition, Petitioner acknowledges that he received transcripts of the witnesses' interviews with prison investigators. Thus, the substance of Claim 3 amounts to an allegation that certain witnesses were shown a photograph of Petitioner and indicated that he was not a participant in the murder of Arthur Dade.

As Respondent notes, Petitioner has submitted the affidavit of Griffin-Bey. In addition, Petitioner has submitted the transcripts of the witnesses' interviews with

prison investigators. The affidavit of Griffin-Bey is dated January 21, 1992. In his affidavit, Griffin-Bey states that he saw the stabbing of Arthur Dade and Petitioner was not involved. He does not state that prison investigators showed him a photograph of Petitioner. Thus, nothing in the record supports Petitioner's contention that the exculpatory evidence Petitioner relies on even exists. Careful review of the interview transcripts submitted by Petitioner does not alter this conclusion.

Claim 6

Petitioner contends that his trial counsel was ineffective because he failed to conduct an investigation into the facts and circumstances of Petitioner's convictions for the assault of cellmate Larry Wickizer and the assault and sodomy of fellow inmate Harold Johnson. Petitioner contends that the assault and sodomy of Harold Johnson occurred when Petitioner was experiencing extreme mental disturbance that caused him to inhale bug spray in order to alter his state of consciousness. Petitioner further states that at his trial for the assault of Larry Wickizer, several witnesses verified Petitioner's contention that the assault was committed in self-defense.

The state introduced evidence concerning the prior convictions during the penalty phase of Petitioner's trial in order to establish that Petitioner had prior serious assaultive criminal convictions and therefore was eligible for the death penalty. *See* Mo. Rev. Stat. § 565.032.2(1). The state also relied on the fact that Petitioner was incarcerated at the time of the murder. Mo. Rev. Stat. § 565.032.2(9). Assuming for the sake of argument that

trial counsel was ineffective for failing to conduct an investigation into the circumstances of Petitioner's prior assault convictions, the Court cannot say that in the absence of this constitutional error no reasonable juror would have found Petitioner eligible for the death penalty. Where the jury finds more than one statutory aggravating circumstance, the subsequent failure of one circumstance does not invalidate the other. *Mercer v. Armontrout*, 844 F.2d 582, 584 (8th Cir. 1988)(en banc); *State v. La Rette*, 648 S.W.2d 96, 102 (Mo. banc.), *cert. denied*, 464 U.S. 908 (1983). Therefore, even assuming that the jury might have viewed the prior assaults in a different light had trial counsel more thoroughly investigated the circumstances surrounding those assaults, a reasonable juror could nonetheless have found Petitioner eligible for the death penalty.

Claim 7

Petitioner states that the government knew and failed to disclose that several witnesses had testified in support of Petitioner's defense of self-defense at his trial for the assault of Larry Wickizer. Evidence concerning Petitioner's conviction for the assault of Larry Wickizer was introduced in the penalty portion of Petitioner's trial. Because Petitioner's conviction for the assault of Larry Wickizer was only relevant in establishing one of two statutory aggravating circumstances, the analysis set forth immediately above applies to this claim as well.

III. Successive Claims

In his first habeas petition, Petitioner claimed, *inter alia*, that trial counsel was ineffective because he failed to investigate or call additional witnesses[9] and because he failed to introduce psychological or psychiatric testimony as mitigating evidence. The district court held that these claims were procedurally barred due to Petitioner's failure to raise the issues in state court. The court held that the ineffectiveness of post-conviction counsel could not constitute the cause necessary to excuse the procedural default. The Eighth Circuit subsequently announced that the ineffectiveness of post-conviction counsel can excuse a procedural default. Because the record did not contain the evidence necessary to determine whether appellate counsel or post-conviction counsel were ineffective, the court of appeals bypassed the procedural bar issue and addressed Petitioner's claims on the merits. *Schlup v. Armontrout*, 941 F.2d 631 (8th Cir. 1991). The court held that trial counsel was not ineffective for failing to call the additional witnesses because their testimony would be either damaging or repetitive. *Id.* at 639. With respect to Petitioner's claim concerning mitigating psychological or psychiatric evidence, the court held that the undeveloped evidence "would not with 'reasonable probability' have

---

[9] Petitioner raised the claim with regard to the following witnesses: Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy. In his current petition, Petitioner reasserts this claims [sic] with respect the aforementioned persons and also includes the trial attorney's failure to interview and call as witnesses the following individuals: Donnie Trendley, Michael Riley, Michael Dunn and John Green.

been likely to change Schlup's sentence." *Id.* (citing *Strickland v. Washington*, 466 U.S. at 694, 699-700).

As a general rule, courts may not consider the merits of claims raised in a previous habeas petition when those claims were determined on the merits. *Sawyer v. Whitley*, 112 S.Ct. 2514, (1992); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). However, the court may address successive claims when the ends of justice so require. *Sawyer*, 112 S.Ct. 2519; *Kuhlmann*, 477 U.S. at 454. This exception is governed by the actual innocence standard announced in *Sawyer*. See *Sawyer*, 112 S.Ct. at 2518-19.

Claim 2

Petitioner contends that counsel was ineffective for failing to interview and call as witnesses certain inmates who claim to have seen the murder of Arthur Dade and who state that Petitioner was not involved. Certainly these affidavits constitute probative evidence that may or may not have swayed the jury had they been presented at trial. However, in view of the countervailing evidence that was presented, the Court cannot say that even upon consideration of all of the materials currently in the record no reasonable juror would have voted to convict Lloyd Schlup of the murder of Arthur Dade.

Claim 5

Petitioner contends that his trial counsel was ineffective in that he failed to conduct a reasonable investigation into Petitioner's background and mental health. Petitioner maintains that a reasonable investigation into these

matters would have disclosed substantial mitigating evidence including a history of severe child abuse, mental illness, and severe organic brain damage. In support of this contention, Petitioner submits affidavits from family members, an electroencephalograph report and the report of Dr. William A. O'Connor, a licensed clinical psychologist. (Exh. B)

During the penalty phase of Petitioner's trial, the jury heard testimony from Lloyd Schlup's mother regarding Mr. Schlup's difficult upbringing. *Schlup v. Armontrout*, 941 F.2d 631, 639 (8th Cir. 1991). The jury also heard testimony regarding a prior assault conviction and the fact that the murder of Arthur Dade occurred while Petitioner was incarcerated. The jury determined that these statutory aggravating circumstances rendered Petitioner eligible for the death penalty. Even if the statements of family members, the electroencephalograph report and the report of Dr. O'Connor had been before the jury, it cannot be said that no reasonable juror would have found that the statutory aggravating circumstances nonetheless rendered Petitioner eligible for the death penalty. See *Sawyer*, 112 S.Ct. at 2524.

For all of the foregoing reasons,

IT IS HEREBY ORDERED that Lloyd Schlup's Petition for Writ of Habeas Corpus is DENIED.

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion for Evidentiary Hearing is **DENIED.**

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion to Expand the Record is: **DENIED.**

IT IS FURTHER ORDERED that Respondent's Motion to Vacate the Stay of Execution is **GRANTED**.

IT IS FURTHER ORDERED that the stay of execution entered in this matter on March 12, 1992 is **VACATED** as of ten (10) days from the date of this Order.

Dated this 23rd day of August, 1993.

/s/ Jean C. Hamilton
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner, v. PAUL DELO, Superintendent Potosi Correctional Center, Respondent.	)	Cause No. 4:92CV00443

JUDGMENT

In accordance with the Memorandum and Order entered in this matter on August 23, 1993 as amended by the Order entered on this date,

IT IS HEREBY ORDERED that Lloyd Schlup's Petition for Writ of Habeas Corpus is **DENIED.**

Dated this 27th day of August, 1993.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted in Printing)

Case No. 4:92CV00443 JCH

(Filed September 7, 1993)

MOTION PURSUANT TO RULE 59(E) TO SET ASIDE ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner, by counsel, and moves this Court, pursuant to Rule 59(e), to set aside its order of August 23, 1993, dismissing Mr. Schlup's petition for writ of habeas corpus. Mr. Schlup is demonstrably innocent of the stabbing of Arthur Dade, and has produced substantial evidence credible enough to warrant a hearing. This Court correctly notes that this case is distinguishable from *Herrera v. Collins*, 113 S.Ct. 853, 860 (1993), because the trial evidence of Herrera's guilt was stronger than the evidence against Schlup[1], and Mr. Schlup's evidence of innocence is far stronger than Herrera's.[2] However, the Court is incorrect in its conclusion that Mr. Schlup has "failed to make a persuasive showing of actual innocence." (Memorandum and Order, p. 12). Counsel urges the Court to set aside its order to avoid the execution of an innocent man.

---

[1] Herrera confessed to the crime; Mr. Schlup has steadfastly maintained his innocence, and his alibi is captured on video tape.

[2] Mr. Schlup's video-taped alibi is now corroborated by many credible eye witnesses, and the state's identification witnesses are not believable if their testimony is viewed on the record as a whole.

I. THE STATEMENT OF JOHN GREEN AND THE VIDEO-TAPED ALIBI PROVES THAT IT IS IMPOSSIBLE FOR MR. SCHLUP TO BE GUILTY.

This Court does not even mention in its opinion the video tape showing that Mr. Schlup was the first prisoner in line for lunch, or the critical evidence produced by Respondent in Exhibit T, which includes the statement of John Green, the clerk for Housing Unit 5, who told investigators on February 8, 1984, that he was the one who called the control center to alert prison authorities to the assault within seconds of the murder. The theory the state constructed at trial to refute the video-taped proof of Mr. Schlup's innocence depended upon the false assumption that Captain Eberle, who took several minutes to arrive at the scene, was the one who made this call by radio. Mr. Green's statement flatly refutes that theory:

> "I stepped out of the office and I heard Sgt. Flowers calling for officers cause they had a fight. Couldn't get nobody so *he told me to call base to notify them of the fight and that's what I did.*"

Exhibit T, p. 31. Mr. Green's statement is credible because there is no possible motive for Mr. Green to lie; no one knew of the existence of the video tape at the time of the interview, and he had no way of knowing how the information he was giving would affect the investigation. Because Mr. Green called the control center on the telephone as the assault was in progress, and Mr. Schlup was in the prison dining room for over a minute when the guards responded to the call, Mr. Green's testimony, if true, establishes the *impossibility* of Mr. Schlup's guilt.

Neither the significance nor the credibility of his testimony can be dismissed without a hearing.

II. THE STATEMENTS AND AFFIDAVITS OF WITNESSES ARE TOO CREDIBLE TO BE DISMISSED WITHOUT A HEARING.

Counsel has personally talked to every witness whose affidavit has been provided to the Court, and is strongly convinced that they are telling the truth. Although the investigation started with information provided by Mr. Schlup or his mother, counsel discovered the majority of eye witnesses by talking to other witnesses, and by methodically searching for people who were known to be housed in the cell block on the day of the stabbing. The Court has not heard the witnesses, but instead dismisses the testimony for reasons that do not necessarily apply.

A. The delay does not reflect on the credibility of the witnesses where several of them gave consistent statements at the time of the offense, where Mr. Schlup's mother made many fruitless attempts to motivate every attorney who ever represented her son to talk to Van Roberson, LaMont Griffin Bey and others, and where racial tensions in the penitentiary prevented the witnesses from coming forward.

The Court says that the testimony of eyewitnesses to the stabbing is "suspect" because it was produced "after a long delay." (Memorandum and Order, p. 12). Several of these witnesses, including John Green and LaMont

Griffin Bey, made statements consistent with the affidavits they later provided within a day of the stabbing.[3]

There are facts and circumstances which explain the reticence of prisoner witnesses to come forward, including the racial tensions in the cell block before and after the stabbing. Prisoners who saw the crime were aware that had they admitted seeing it, they would have been pressured by prison officials to "snitch" against the people who committed the murder. This particular stabbing heightened racial tensions in the prison because it was rumored to be a "hit" of an African-American inmate (Dade) by members of the Aryan Brotherhood, a white-supremacist prison gang. Many witnesses whose statements are recorded in Respondent's Exhibit T refer to the racial tension in the prison as the reason for not wanting to answer questions.[4] When Maurice Ford was asked whether the possibility of further retaliation made him tense, he replied, "oh, hell yes." (Respondent's Exhibit T,

---

[3] This Court noted that Mr. Schlup's mother urged every attorney who ever represented her son to talk to the prisoners who told prison investigators that they saw the murder, and, incredibly, not one single attorney lifted a finger to do this investigation until early 1992. The circumstances of the delay in presenting their affidavits reflect more on the integrity of the bench and bar than it does on the credibility of the witnesses.

[4] "[S]ometimes you see or don't see that's the best way to stay healthy, you see what I'm saying . . . " (interview of inmate Van Roberson, Respondent's Exhibit T, p. 15). Based on Roberson's statement, and the fact that he has been released from prison, Petitioner believed he would be likely to provide reliable testimony establishing Petitioner's innocence. Counsel learned from Roberson's mother that he died about three years ago.

p. 19). Joe Beck heard rumors about African-American prisoners retaliating for Dade's death. (Id., p. 17). The overwhelming majority of inmates took the safest course of action, which is simply not to be a witness.

Although the stabbing occurred in a crowded cell block, only Lamont Griffin-Bey and Ricky McCoy were willing to name the persons involved in the stabbing when they talked to investigators.[5] Counsel's experience has been that prisoners who are unwilling to talk to prison guards will sometimes talk freely with a defense attorney. In this case, it is practically certain that a number of prisoners who said they did not see the murder were not being truthful, either out of fear of reprisal or hostility towards the prison administration, or both. The evidence at trial indicated that the murder happened on a crowded cell block; it is certain that there were other eye-witnesses besides the two guards and the two prisoners.

B. Many inmates who swear to Mr. Schlup's innocence have a strong motive to refrain from perjuring themselves.

Although the Court apparently feels that all prisoner testimony in this case can be dismissed simply because "fellow inmates . . . do not . . . have a strong incentive to refrain from perjuring themselves," (Memorandum and Order, p. 12), this is not an accurate observation in this case. The fact is that many of the prisoners who saw the

[5] Neither of them put the petitioner at the scene of the crime.

murder, including Emmett Nave, Donnell White, Courtney Lovelace and James Pierce, are African-Americans, some of whom belong to Black prison gangs. Because the murder was a "hit" of a Black Muslim prisoner by members of a white supremacist prison gang, these witnesses have an incredibly strong disincentive against perjuring themselves for a white man convicted of stabbing Dade. Donnell White was standing right next to Dade when the stabbing took place. Dade was his friend. There is no conceivable motive for him to perjure himself to clear the assassin of his friend.

C. Rodney Stewart, who was convicted of this crime, has a strong motive not to incriminate himself for Mr. Schlup's benefit.

Rodney Stewart was convicted of this crime, but is still vigorously pursuing his appeals. In fact, he recently appeared (by remote link-up) on the Phil Donahue Show discussing his desire to sell one of his lungs or a kidney to hire legal counsel to pursue his case. Although he has a strong disincentive to incriminate himself, he told an investigator:

> Stewart said since Hurt was a member of the Aryan Brotherhood and he had been threatened, Robert O'Neal told him he wanted to "hit" Stump, or kill him. Stewart said that O'Neal came to him about killing Dade, and Stewart tried to talk him out of it. He said he didn't want anything to do with it, and he claimed that he told O'Neal that he was crazy for doing it.
>
> Stewart said that the day Dade was killed, Stewart knew O'Neal was going to do it because

> O'Neal had been drinking wine, which was some kind of home brew made in the penitentiary, and taking Benadryl and smoking dope. Stewart said O'Neal was really wound up, and he wanted Stewart to hold up a sheet so that the guards could not see him kill Arthur Dade.
>
> Stewart told me that Robert O'Neal got Rocky Jordan, also known as Randy Jordan, to help him kill Arthur Dade. Stewart said that when the doors opened for lunch, Rocky Jordan and Bob O'Neal ran to Dade's cell. He said that O'Neal threw hot water on Dade's face, using an orange cup, and that *Jordan held Dade while O'Neal stabbed him.*

(Affidavit of Larry Bodinson, p. 2). Randy Jordan, a/k/a Rocky Jordan, is the man seen in the video tape sitting at the same table with O'Neal in the prison dining room. Unlike Mr. Schlup, neither O'Neal nor Jordan went through the serving line to get a tray of food.

The Court will note that several prisoners say in their affidavits that they are reluctant to name the third perpetrator for fear of their own safety. Although these men told counsel that Randy Jordan was involved in the stabbing, they were unwilling to put his name in their affidavits, and expressed reluctance at coming to a hearing at which they would have to name Mr. Jordan as the man who assisted O'Neal and Stewart in the stabbing of Arthur Dade. Counsel has no power to offer them protection of any kind for their cooperation. However, counsel was hoping that at an evidentiary hearing, one or more of them would be willing to testify to the identity of the actual perpetrators.

D. The eye-witness testimony of innocence is consistent with the video-tape proof of Mr. Schlup's innocence.

The Court makes absolutely no mention of the video tape which shows that Mr. Schlup is in the prison dining room when Arthur Dade was stabbed. It is impossible to evaluate the strength of the evidence for either side in this case without discussing the video tape. The tape is irrefutable corroboration of the prisoner witnesses, and it shows that the prison guards are mistaken in their identification of Mr. Schlup. It is the key to reconstructing the events on February 3, 1984, because it is the only completely objective evidence available. It establishes the following sequence of events:

> 0:00 Mr. Schlup enters the dining room;
> 1:05 Guards run out of the dining room in response to radio alert;
> 1:31 Robert O'Neal runs into the dining room, and along the back wall toward the rest room as Mr. Schlup carries his tray to a table.

It should also be noted that Mr. Schlup's time before entering the dining room is accounted for by Officer Faherty, who saw him coming down the corridor, and stop to talk to another prisoner through an open window. (trial tr., 315-16). Mr. Schlup in his statement said that the officer (he wasn't sure if it was Officer Faherty or another officer) searched him before he continued on to the dining room.[6] This is a long hallway, and Officer Faherty

---

[6] This is consistent with the testimony of Officer Bittle that it was routine to pat down inmates as they entered the lunch room. (Trial tr. 133).

said that besides hollering out the window, there was nothing unusual about his behavior. He did not say that Mr. Schlup was running, or that he was out of breath. This lengthy corridor represents about half of the distance between the housing unit and the dining room. See the Floor Plans of Housing Unit 5A, Trial Exhibit 9, (the 1st floor plan administration level), and Trial Exhibit 10, (level three floor plan). Mr. Schlup had to be in sight or immediate presence of Officer Faherty for around a minute immediately before entering the dining room, and it took him between 30 seconds and a minute to get from the housing unit to that point.[7] Using Mr. Schlup's appearance on the video as "00:00" minutes and seconds, the murder had to have been completed at least one and a half minutes to two minutes earlier to give him time to move from the housing unit to the dining room, stop at the window, and be frisked by the guard. Investigator George Brookes testified for the state that he ran from the scene of the crime to the dining room in 33 seconds, walked it briskly in one minute and three seconds, and walked it at a normal pace in one minute and thirty seven seconds. (Trial tr. 465-66).

Mr. Schlup's participation in the stabbing is completely implausible in light of the fact that Unit Clerk John Green called the assault in to the base within seconds of the stabbing. He saw Dade collapse; he saw

[7] Captain Eberle testified that it took him around a minute to get from the control room, which is right next to the point where Officer Faherty would have first seen Mr. Schlup, up the stairs to the housing unit. (Trial tr. 214). Also see Trial Exhibit 9. Mr. Schlup would have come down from the housing unit by this same route, and travelled approximately the same distance.

Flowers come around the corner with Stewart in custody, and heard Flowers tell him to call base, and Green complied. The call went out no more than a minute after the stabbing; this places Mr. Schlup in the dining room when the murder happened.

The time sequence can also be reconstructed from the moment Mr. O'Neal enters the picture, and counting backward from there. As Officer Brookes proved, the distance from the scene of the crime to the dining room could be covered in less than 35 seconds running, and about a minute walking briskly. Although witnesses establish that Mr. Schlup walked from the housing unit, witnesses establish that Mr. O'Neal hurried to the dining room. Larry Farris, one of the officers seen on the video tape running out of the dining room, saw O'Neal hurrying down the last flight of stairs between T-3 and the dining room. (Trial tr. 322-26).[8] Farris observed blood on O'Neal's trousers, so he turned and followed him back to the dining room. Allowing a full minute for O'Neal to hurry from the scene of the crime to the dining room, Mr. Schlup had already been on camera for thirty seconds when O'Neal fled the scene.

[8] No attempt was made at Mr. Schlup's trial to determine whether Mr. O'Neal was walking or running when Officer Farris encountered him. In O'Neal's trial, Farris testified that O'Neal was "walking down the steps hurriedly." (Trial tr., State v. O'Neal, p. 412).

Immediately after stabbing Arthur Dade, O'Neal fled. (Testimony of Roger Flowers, Trial tr., p. 251).[9] Flowers did not see where he went. Officer Maylee said that he *ran* about 35 feet to a window, broke it, and threw the knife out. (Trial tr. p. 338). He then went to the utility sink, rinsed the blood off, and headed to the dining room.[10] Even generously allowing a full minute for O'Neal to throw the knife out the window and wash in the sink, Mr. Schlup was in the presence of Robert Faherty when O'Neal stabbed Dade.

By suggesting that radio was the only means of communication from the cell block,[11] that the assault call went out when Captain Eberle arrived on the scene with his radio,[12] and that this event took place several minutes after the stabbing, the prosecutor tried to show that the murder happened at least two minutes before Mr. Schlup appeared in the dining room. Mr. Schlup has produced

---

[9] Q. You saw O'Neal hit Dade in the chest several times?
A. Yes, sir.
Q. What's the very next thing you saw?
A. That's when the – the very next thing I saw was Bob O'Neal break and run.
(Testimony of John Maylee, Trial tr. p. 354).

[10] The prosecutor on opening statement said, "O'Neal, who had the knife, ran to a window nearby, broke out the window and threw the knife out the window. And then also *ran* to the dining room area. First tried to wash some blood off his hands and then *ran* to the dining room area." (Trial tr. p. 106.) (emphasis added).

[11] It was not; there is a telephone in the office next to the stairway.

[12] This is not so; Joe Green put out the call as the assault was taking place.

proof, which could not have been fabricated, that the call to which the guards responded came seconds after the stabbing. This proof includes not the statement of Joe Green and the testimony of corrections officers who passed Robert O'Neal in the hallway as he was fleeing the scene of the crime.

William Foster's affidavit is important on this point. He signed a sworn affidavit that he did not see the crime, but was on the way to the dining room when he heard the commotion on the cell block. Within seconds of the commotion beginning, he had to step aside for the guards who were running out of the dining room. He turned and followed them, and he ended up being one of the prisoners who carried Dade to the hospital. Again, if this man is telling the truth, Mr. Schlup was already in the dining room when the murder happened. When counsel interviewed Mr. Foster, he could not have understood the significance of this fact. The court has not heard his testimony; counsel is convinced he is telling the truth.

E. The affidavits of members of the Missouri Bar and statements in Respondent's Exhibit T are inherently credible corroboration of Mr. Schlup's substantive and procedural arguments, and warrant an evidentiary hearing.

Petitioner has alleged that the state failed to disclose material evidence, including statements of prisoners who saw the murder, and apparently viewed photographs. The court correctly observes that Lamont Griffin Bey makes no mention of photographs in his affidavit. (Memorandum and Order, p. 14). Although he remembers what

he saw when Dade was stabbed, he does not recall seeing photographs during the interview, even though his statement seems to imply that he was looking at photographs as the investigators were questioning him. This, however, is not dispositive of the issue. The Court overlooks the fact that Respondent's Exhibit T contains explicit reference to Ricky McCoy viewing photographs of suspects.[13] Mr. Bushmann's affidavit also indicates that he did not receive disclosure from the state of any inmate witness who saw the crime, or he would certainly have interviewed them.

III. THE IDENTIFICATION TESTIMONY OF THE ROGER FLOWERS AND JOHN MAYLEE IS UNBELIEVABLE.

The court rests its rejection of the prisoner testimony entirely on the basis of "the positive identifications made by officers Flowers and Maylee . . . " Memorandum and Order, p.12. This conclusion is clearly erroneous in light of the objective evidence of the video tape, which the court never mentions. The court's rejection of Mr. Schlup's direct evidence of innocence, without a hearing, is also clearly erroneous in light of the fact that the testimony of these men is inconsistent and contradictory. There are many problems and inconsistencies in this identification testimony, some or which were known to the jury, but many were not. For purposes of the issue of whether Mr. Schlup has produced sufficient proof to be

---

[13] Unfortunately, counsel has learned that Ricky McCoy and Van Roberson are now deceased.

entitled to a hearing on his constitutional claims, the court must look at *all* of the evidence:

> The petitioner must show a fair probability that in light of all the evidence, *including that alleged to have been illegally admitted* (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt."

Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986). To hold, as this Court does, that the jury heard many contradictions in the testimony of the officers, and therefore it is of no consequence that the jury failed to hear even more impeachment evidence, (Memorandum and Order, p. 13), entirely misses the point that this testimony is not believable in light of all the evidence.

The Court again declines to account for the significance of the video tape. The Court dismisses in a footnote the prior inconsistent statement of Officer Flowers in which he claims that the suspect he identified as Mr. Schlup ran toward the back end of the hallway, toward the locked end of the walk, *in the opposite direction from the dining room.* If this is true, then the suspect would not have arrived in the dining room several minutes before Robert O'Neal; he would have arrived closer in time to O'Neal, if he got there at all. This is not a trivial inconsistency; under Missouri law in effect at the time of trial, this statement is admissible as substantive evidence that the perpetrator ran in the opposite direction from the dining room. This is not mere impeachment evidence; it greatly enhances the value of the video tape as direct

proof of Mr. Schlup's innocence. It shows that the officers are mistaken in their identification of Mr. Schlup. To say that these *additional* inconsistencies are insufficient to cast doubt upon their testimony because the jury already heard about a lot of *other* inconsistencies is illogical.

IV. LLOYD SCHLUP HAS STEADFASTLY MAINTAINED HIS INNOCENCE.

Mr. Schlup's case is distinguishable from *Herrera* in another important aspect. Herrera confessed; Mr. Schlup has steadfastly maintained his innocence from the very beginning.

On the day Arthur Dade was stabbed, Mr. Schlup was interrogated by Investigator George Brooks and Cole County Deputy, John Hemeyer. Mr. Schlup denied any involvement in the offense and made a statement that proved to be true in every detail.[14] He said that he was the first one down for lunch and was followed by Ricky Easley, Bernard Bailey and Arthur St. Peter. The surveillance camera video tape proved this to be true. He said that before he got to the dining room he was reprimanded by a guard for shouting out of an opened window. Lieutenant Faherty's report indicated that this, too, was the absolute truth. Mr. Schlup adamantly denied that the stains on his shoes were blood; he speculated that it was probably ink. Laboratory tests on his shoes revealed

---

[14] He also testified in the penalty phase of his trial consistently with what he told investigators. (Trial tr., 584-85, 604-634).

that he was again telling the truth.[15] Petitioner told investigators that he went directly to the dining room. Mr. Schlup wanted to finish his lunch quickly so that he could go outside and play handball. (Trial tr. 632-33). Hemeyer's inventory of the items taken from Mr. Schlup during the interrogation indicate that he seized a shirt, a pair of pants, shoes and a handball.[16] All of his clothes were taken from him for laboratory testing, and were found to have no traces of blood.

Mr. Schlup's statement, submitted herewith, reveals that he urged police to investigate every aspect of what he was saying. At one point, the interrogators cautioned him about giving specific information that might not check out:

> BASINGER: Well, you'd say it would be pretty positive than if a man identified you as being the one there, it'd almost have to be you, wouldn't it?

---

[15] The parties stipulated at Petitioner's trial that the clothes and shoes that were seized from Mr. Schlup contained no evidence of blood whatsoever.

[16] Mr. Schlup testified in the penalty phase of his trial that he was not involved in the stabbing of Arthur Dade. The Prosecutor vigorously cross-examined him, and under Missouri Law, the Defense was then entitled to introduce into evidence the prior consistent statement that Mr. Schlup gave to prison investigators. Trial Counsel attempted to explore the statement in the guilt phase of the trial and was prevented from doing so. (Trial tr. 373-377). However, there was nothing to prevent the proper admission of that statement as rehabilitation of Petitioner during the penalty phase of his trial.

SCHLUP: Nope. Cause he couldn't ain't nobody could identified me over there not nobody identified me. Now I'm sure you could get some officers from the dining room that can identify me as being in the dining room.

BASINGER: I'm sure eventually you got to the dining room, Lloyd, that's not . . .

SCHLUP: Mr. Basinger, I was the first one in the dining room, man.

HEMEYER: Whoa, be careful.

BASINGER: Don't be parachuting on us.

Statement of Mr. Schlup, p. 13. The questioners were obviously skeptical of the possibility that Mr. Schlup could have been involved in the stabbing and make it to the dining room ahead of all the other inmates. At this time, no one knew the dining room surveillance camera had captured the moment on tape.

V. THE STANDARD OF PROOF USED TO DECIDE THE SUFFICIENCY OF MR. SCHLUP'S EVIDENCE OF INNOCENCE, THAT NO REASONABLE JUROR COULD FIND HIM GUILTY OF FIRST DEGREE MURDER, IS A HIGHER STANDARD THAN THAT REQUIRED BY THE U.S. SUPREME COURT.

In reviewing petitioner's constitutional claims, the Court denied relief because it felt that petitioner's claim of innocence could not meet the actual innocence test of *Sawyer v. Whitley*. In a line of recent cases, the Eighth Circuit Court of Appeals has modified and expanded the

scope of the *Sawyer* test and held that it applies to defaulted constitutional claims that are supplemented by petitioners with a colorable claim of innocence of the underlying criminal conviction. *Bolder v. Delo*, 985 F.2d 941, 943 (8th Cir. 1993); *McCoy v. Lockhart*, 969 F.2d 649, 651 (8th Cir. 1992).

Petitioner contends that this extension of the application of the *Sawyer* test to guilt/innocent claims conflicts with the Court's holding in *Sawyer* itself, and opinions of other circuit courts of appeal.

Prior to *Sawyer*, the Court had adopted an actual innocence test to apply to defaulted constitutional claims that were supplemented with a colorable claim of the petitioner's actual innocence of the underlying criminal offense. *Kuhlmann v. Wilson*, 477 U.S. 454 (1986). To overcome a procedural bar under the *Kuhlmann* test, a habeas petitioner must show a fair probability in light of all the evidence, including evidence that is newly discovered, that the trier of fact would have entertained a reasonable doubt of petitioner's guilt. *Id.* at 545, n.17. The *Kuhlmann* test was later adopted and cited with approval in the abuse of the writ and procedural bar context in *McCleskey*, 111 S. Ct. at 1471 and *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1721 (1992). Petitioner's constitutional claim would clearly be reviewable under the *Kuhlmann* test because, if a second jury heard the new evidence, there is a reasonable likelihood petitioner would have been acquitted of the offense of capital murder. One could not conclude otherwise when the evidence consists of the testimony of eye-witnesses to the crime, corroborated by a video-taped alibi.

However, under the eighth circuit's modified reading of the *Sawyer* test, the court found that petitioner could not meet the burden of establishing that no reasonable juror would have found him guilty of capital murder in light of his newly discovered evidence of actual innocence, simply because the evidence at trial consisted of the testimony of two prison guards' "positive identification" of Mr. Schlup, even though this evidence is contradictory and inconsistent on material points. The eighth circuit's expansive and modified application of the *Sawyer* test to claims of innocence going to the underlying criminal conviction is clearly contrary to the Court's opinion in *Sawyer.*

In the majority opinion, Chief Justice Rehnquist cited with approval the *Kuhlmann* actual innocence test regarding the appropriate standard for federal courts to apply to claims affecting guilt or innocence of the underlying crime. *Sawyer,* 112 S. Ct. at 2519, n.5. Shortly thereafter, Chief Justice Rehnquist noted that:

> The present case requires us to further amplify the meaning of 'actual innocence' in the setting of capital punishment. A prototypical example of 'actual innocence' in a colloquial sense is a case where the state has convicted the wrong person of the crime. . . . In the context of a noncapital case, the concept of 'actual innocence' is easy to grasp.

Id. at 2519-2520. Clearly as the foregoing language in the *Sawyer* majority opinion indicates, the *Kuhlmann* standard remains the proper test for federal courts to apply when analyzing defaulted constitutional claims supplemented

with a claim of innocence going to the underlying criminal conviction. The Court did not overrule *Kuhlmann;* to the contrary, it re-affirmed that test. Petitioner suggests that a close reading of *Sawyer* indicates that the Court adopted a standard for abusive or defaulted *sentencing* claims that is deliberately higher than that applied to defaulted guilt/innocence claims.

This view is supported by the fact that the other circuit courts of appeals who have decided the scope of the *Sawyer* test have concluded that *Sawyer* should be strictly limited to claims affecting the propriety of death sentences in capital cases and that the *Kuhlmann* and *McCleskey* standards still are applicable to constitutional claims raising issues of a petitioner's innocence of the underlying crime. *Montoya v. Collins,* 988 F.2d 11, 13 (5th Cir. 1993); *Campbell v. Blodgett,* 982 F.2d 1321, 1331 (9th Cir. 1992). The eighth circuit's broad reading and application of the test formulated in *Sawyer* exceeds the scope for which that test was intended by the Court, and is in clear conflict with opinions from other circuits.

VI. IT VIOLATES MR. SCHLUP'S DUE PROCESS AND EIGHTH AMENDMENT RIGHTS TO EXECUTE HIM WHEN HE PRESENTS A TRULY PERSUASIVE CASE OF INNOCENCE OF THE UNDERLYING CRIME BASED UPON POST-TRIAL NEWLY DISCOVERED EVIDENCE THAT, IF PRESENTED TO A SECOND JURY, WOULD PROBABLY RESULT IN PETITIONER'S ACQUITTAL OF CAPITAL MURDER.

Petitioner's case presents the questions left unanswered by this Court's fragmented opinions in the

recent decision of *Herrera v. Collins*, 506 U.S. ___, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993). In *Herrera*, the sharply divided Court did not decide the question of what standard of review to apply when considering a state death row inmate's claim of innocence based upon post-trial newly discovered evidence. At least six members of this Court explicitly recognized in *Herrera* that it would offend the federal Constitution to permit the execution of a state death row inmate who could present a convincing case of actual innocence based upon newly discovered evidence. However, this Court did not ultimately decide what quantum of proof is necessary for a petitioner to be entitled to relief from his conviction and death sentence.

Petitioner contends this Court should apply the standard of review announced by this Court in *Kuhlmann v. Wilson*, 477 U.S. 436, 455, n.17 (1986). Under the *Kuhlmann* test, a habeas petitioner will be entitled to relief if there is a fair probability in light of all the evidence, including the newly discovered evidence, that the "trier of facts would have entertained a reasonable doubt of [petitioner's] guilt." *Id.* In other words, a habeas petitioner basing a claim on newly discovered evidence, must show that the jury would probably have had a reasonable doubt as to his guilt.

A test similar to that in *Kuhlmann* has been adopted by several courts of appeals in analyzing federal habeas petitioner's claims of actual innocence based upon newly discovered evidence. *Jeffries v. Blodgett*, 988 F.2d 923 (9th Cir. 1993); *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991); *Sanders v. Sullivan*, 863 F.2d 218 (2d Cir. 1988); and *Williams v. Griswold*, 743 F.2d 1533 (11th Cir. 1984). This line of court of appeals cases has recognized that a prisoner's

due process rights are violated where a state fails to grant a prisoner relief where credible newly discovered evidence "would most likely affect the verdict." *Sanders v. Sullivan*, 863 F.2d at 224-225.

Justice O'Connor recognized that it would violate the federal constitution to execute an individual who could present a convincing case of innocence based upon post-trial newly discovered evidence. *Id.* at 228. However, in Justice O'Connor's view, it was unnecessary to decide that question in *Herrera* because Herrera's newly discovered evidence did not even come close to presenting a convincing case of innocence. *Id.* As Justice O'Connor pointed out:

> Ultimately, two things about this case are clear. First is what the Court does not hold. Nowhere does the Court state that the Constitution permits the execution of an actually innocent person. Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim. . . . Accordingly, the Court has no reason to pass, and appropriately reserves, the question of whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open.

Id. at 233-234.

VII. THE CONDUCT OF THE STATE COURT DESTROYED THE INTEGRITY OF THE STATE POSTCONVICTION PROCESS. THIS COURT'S CONCLUSION THAT THIS CONDUCT, WHICH PRECLUDED HIS STATE COUNSEL FROM INVESTIGATING THE CASE, AND WHICH FEDERAL HABEAS COUNSEL WAS AFRAID TO ADDRESS, DOES NOT SATISFY THE CAUSE AND PREJUDICE TEST IS INCONSISTENT WITH THE EQUITABLE NATURE OF HABEAS CORPUS REVIEW.

The federal courts agree on a handful of factors that are relevant in evaluating the equities of disturbing a final judgment, including whether petitioner demonstrates difficult circumstances, whether the parties have relied on the finality of the judgment, whether the petitioner was never heard, but advances meritorious claims in the underlying litigation, or whether *finality would undermine public confidence in the judicial system. See Klapprott v. United States*, 335 U.S. 601, 614-15 (1949); *Liljeberg*, 56 U.S.L.W. at 4642-43; *Jackson v. People's Republic of China*, 794 F.2d 1490, 1496-97 (11th Cir. 1986); *Ritter v. Smith*, 811 F.2d 1398, 1401-02 (11th Cir. 1987). In *Liljeberg v. Health Services Acquisition Corp.*, 56 U.S.L.W. 4637 (1988), the court relieved a party from an unfair and improper judgment, vacating the judgment months later merely to redress the appearance of impropriety. *Id.* at 4643. The opposing party had not demonstrated "special hardship" by reason of reliance on the order and thus the court found "a greater risk of unfairness in upholding the judgment . . . than there is in allowing . . . a fresh look at the issues." *Id.*

Both petitioner and his mother have persistently attempted to motivate members of the Missouri Bar to investigate his case. Mr. Schlup named several witnesses in his pro se motions. Each time a new attorney was appointed for Mr. Schlup, his mother personally visited that attorney, and explained that there were witnesses to the crime who needed to be interviewed. Each time, she left counsel's office with assurances that the investigation would be done. She met with Mr. Kempton and Mr. Howard, but neither of them talked to a single witness. Each of them have provided affidavits explaining the circumstances. Submitted herewith are the motions for continuance that Mr. Kempton filed in the Missouri circuit court. Mr. Kempton told the Rule 27.26 hearing court:

> . . . [Mr. Schlup] has specifically requested and directed counsel to locate, interview and depose certain witnesses who Petitioner believes to have relevant and material information and evidence concerning Petitioner's claims herein.
>
> * * *
>
> That counsel for petitioner has not had sufficient and adequate time to conduct investigation and discovery which Petitioner has requested and which counsel believes is necessary to the proper presentation of the issues herein.
>
> * * *
>
> That Petitioner does not intend to waive any claim or right herein. In fact, Petitioner has expressly advised counsel that he declines to waive any claim raised in his 27.26 motion filed herein or any claim which could be discovered and raised herein if counsel were allowed to

> conduct full and adequate discovery and investigation and adequately prepare for a hearing herein.

Motion for Continuance, *Schlup v. State*, St. Charles County case no. CV187-3457CC, filed October 29, 1987.[17]

Although the U.S. Supreme Court indulges in the fiction that an attorney acts as an agent of the client, thereby justifying its decision in *McClesky v. Zant*, 111 S.Ct. 1454 (1991), which irrevocably binds the client to the oversight of the lawyer, in this case that fiction is demonstrably untrue. Mr. Schlup and his mother did everything they could to spur counsel into action. It is outrageously unfair that Mr. Schlup will be killed because one attorney was impeded and another intimidated by the improper conduct of a member of the judiciary. This Court's ruling that this conduct, as a matter of law, does not provide adequate cause to allow an innocent man to have his eyewitnesses heard in a court of law perpetuates the blemish that this puts on the integrity of American justice. Mr. Schlup's execution, if allowed to go forward, will be a shameful event for the bench and the bar of this state.

Although the U.S. Supreme Court has recently restricted the circumstances under which a habeas petitioner can upset the finality of a state judgement, it has preserved the cause and prejudice exception and the miscarriage of justice exception to the doctrines of abuse of the writ and procedural default. Justice O'Connor stated in *Smith v. Murray*, 477 U.S. 478, 495 (1986), "That in

---

[17] The motion names Lamont Griffin and Jack Babcock among the witnesses to be interviewed.

appropriate cases, the principles of comity and finality that form the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." Furthermore, the conduct of a state court may satisfy the "cause" element of the cause and prejudice test. See. e.g., *Godfrey v. Kemp*, 836 F.2d 1557, 1569 (11th Cir. 1988), *cert. dismissed*, 487 U.S. 1264 (1988), finding "cause" where a state court denied the petitioner an "opportunity to file a timely objection." Mr. Kempton in his affidavit and in his motion for continuance has explained in detail his inability to investigate and present the very evidence that Petitioner now seeks to have heard.[18]

It is also clear from the facts that when the 8th Circuit Court of Appeals denied Mr. Schlup's first habeas petition, it had no idea what the witnesses in question would actually have said. Furthermore, it had no opportunity to address the existence of the many subsequently discovered witnesses who saw the stabbing of Arthur Dade. None of the testimony relied upon in that opinion was from anyone who had actually spoken with the witnesses. This court had sufficient evidence before it to determine that it would be necessary to hear additional evidence. Trial counsel in his affidavit does not assert a strategy reason for not interviewing these potential eyewitnesses, and now acknowledges that he would in fact have called these witnesses at trial had he known that they saw the

---

[18] He also sets out in his motion for continuance the fact that at the time of the Rule 27.26 hearing, the transcript of the Wickizer trial had not yet been prepared. He presented this as further reason for continuing the hearing.

stabbing. It is unreasonable to rely on the previous denial of a similar claim based on inaccurate facts. (See Memorandum and Order, p. 18). Petitioner has amply demonstrated that the ends of justice require the court to address this claim. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

CONCLUSION

On appeal from the denial of Mr. Schlup's previous petition Senior Judge Heaney noted:

> This was a close case. There was conflicting evidence as to Schlup's guilt, and Schlup was able to present a plausible alibi defense. While I believe the evidence was sufficient to support Schlup's conviction, the evidence was not overwhelming, and the jury deliberated several hours before it reached a verdict. Under such circumstances, it is particularly important that the penalty phase of a trial be free from prejudicial error.

Schlup v. Armontrout, Slip opinion no. 90-1164, p. 27-28 (8th Cir., filed July 22, 1991). (Heaney, Sr. J., dissenting). Judge Heaney, when he made that statement, was not aware of the evidence that Petitioner tendered to the District Court in conjunction with this petition for writ of habeas corpus. The evidence in support of Petitioner's claims reveal that the state's case is far weaker, and Petitioner's defense is far stronger than he originally thought.

Since, as this Court has noted, petitioner's claim of innocence is factually much stronger than Herrera's, this Court should set aside its order denying Mr. Schlup's

petition and hear the evidence of his innocence. In the alternative, this Court should extend its stay of execution in order to facilitate orderly resolution of the vitally important question of the appropriate procedures and standard of review to apply to innocence claims. WHEREFORE, Petitioner moves this court to:

1. Set aside its order of August 23, 1993;

2. Reinstate the stay of execution presently in effect pending the disposition of this motion;

3. Hold an evidentiary hearing; and

4. Enter an order issuing the writ of Habeas Corpus.

Respectfully submitted,

MISSOURI CAPITAL
PUNISHMENT
RESOURCE CENTER

/s/ S.D. O'Brien
Sean D. O'Brien

500 East 52nd Street
P.O. Box 22609
Kansas City, MO 64113-2609
816/235-2383
FAX 816/444-6560

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 JCH

(Filed Sept. 9, 1993)

SUPPLEMENTAL MOTION PURSUANT TO RULE 59(E) TO SET ASIDE ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner, by counsel, and for his supplemental motion pursuant to Rule 59(e) to set aside this Court's order of August 23, 1993, states as follows:

1. In his Traverse and in his original motion under Rule 59(e), Petitioner explained to the Court that the statement of John Green, the clerk for Housing Unit 5 in February, 1984, was powerful evidence of Mr. Schlup's innocence, and the Court should hear his testimony before deciding Mr. Schlup's fate. The Court makes no mention of Mr. Green's statement in its Memorandum and Order dismissing Mr. Schlup's petition.

2. Mr. Green on February 8, 1984, told prison investigators that Sergeant Flowers, the first Corrections Officer at the scene of the stabbing, told him to call base for help. Green said that he complied with that order. At trial, no one knew who put out the assault call to which the dining room guards responded. It was assumed, incorrectly, that Captain Eberle was the officer who did so because he was the first to arrive at the scene with a radio. Mr. Schlup's video-taped alibi was rejected by the jury because Eberle's call was several minutes after the incident, allowing Mr. Schlup time to run to the dining room to be first in line for lunch. Mr. Green's statement

that he called base within seconds of the stabbing is persuasive, if not conclusive, rebuttal of this theory. Green could not have known when he made this statement that Mr. Schlup was in the dining room for a full minute when the call went out. There is no conceivable motive for him to have fabricated this information.

3. Counsel for Mr. Schlup has located Mr. Green and on September 7, 1993, traveled to Mr. Green's home in Washington County, Kansas, to interview him.

4. Mr. Green provided a sworn affidavit stating that he saw the murder of Arthur Dade. Although prisoners who saw the murder are reluctant to name the actual perpetrators, Mr. Green has not returned to prison since his release in January of 1986. He does not have the same fear of retribution that other witnesses have expressed.

5. Mr. Green not only verifies under oath his earlier statement that he called base within seconds of Dade's hitting the ground, he also states that he saw the stabbing of Arthur Dade. He saw Randy (a/k/a/ Rocky) Jordan hold Arthur Dade while Robert O'Neal stabbed him. This is consistent with what other witnesses have told counsel. However, since these witnesses are still in prison, they are reluctant to sign any document naming the actual perpetrator. Mr. Green provides a persuasive eye-witness account that Mr. Schlup is not guilty of the crime.

6. Submitted herewith is the affidavit of Mr. Green and the following exhibits to his affidavit:

A. Affidavit Exhibit 1: (Filed under seal, pursuant to agreement) The floor plan of Housing Unit 5A, with Mr. Green's notes regarding the location of certain people and events;

B. Affidavit Exhibit 2: A photograph of Randy Jordan, on the back of which Mr. Green noted, "This is Randy (Rocky) Jordan, the man who held Dade while O'Neal stabbed him."

C. Affidavit Exhibit 3: A photograph of Robert O'Neal, on the back of which Mr. Green noted, "This is Robert O'Neal, the man who stabbed Arthur Dade while Jordan held him."

D. Affidavit Exhibit 4: A photograph of Rodnie Stewart, on the back of which Mr. Green noted, "I recognize this man as Rodney Stewart, the man Sgt. Flowers took down stairs after Dade was stabbed."

E. Affidavit Exhibit 5: A photograph of petitioner, on the back of which Mr. Green noted, "I recognize this man as Lloyd Schlup. I did not see him anywhere around when Dade was stabbed."

7. Petitioner has presented a truly persuasive case of innocence. Mr. Schlup has now produced affidavits and statements of fifteen eyewitnesses to the stabbing of Arthur Dade; a video tape showing that he was in the prison dining room when Arthur Dade was stabbed; statements of witnesses who corroborate the fact that the corrections ran out of the dining room more than a minute after petitioner entered the room, but within seconds of Dade's stabbing; and numerous contradictions and inconsistencies in the testimony of the state's identification witnesses. Furthermore, petitioner has produced sufficient evidence to obtain an indictment and support a conviction against the real culprit, Rocky Jordan. What more would a petitioner have to show this Court to prevent his execution without a hearing?

WHEREFORE, the Petitioner moves this Court to set aside its order of August 23rd, 1993, dismissing his petition for writ of habeas corpus without a hearing and dissolving his stay of execution.

Respectfully submitted,

MISSOURI CAPITAL
PUNISHMENT RESOURCE
CENTER

/s/ S. D. O'Brien
Sean D. O'Brien

5319 Rockhill Road
Kansas City, MO 64110
816/363-2795
FAX 816/363-2799

Attorney for Petitioner

Affidavit

Comes now affiant, John Green, born November 22, 1961, and first being duly sworn, states as follows:

On February 3rd, 1984, I was the Unit Clerk in Housing Unit 5 of the Missouri State Penitentiary in Jefferson City, MO. A unit clerk processes paperwork, sorts mail, types, and follows orders given by corrections officers. I worked in the office of the Housing Unit.

On that day, I was standing near Sergeant Flowers by the lever box for one walk as he was "racking the walk," which means he was pulling the master lever that opened all the cells. I was talking to him at the time drinking a

cup of coffee. I don't remember what we were talking about. Flowers stepped away from the lever box, and I was left standing by myself. I didn't see where he went, but under normal circumstances, he would have headed straight over to the "B" side of the housing unit to rack those walks.

I looked down one walk, and I saw Randy Jordan holding Arthur Dade. Jordan was standing behind Dade, and had Dade's arms pinned to his sides from behind. I saw Robert O'Neal stab Dade several times in the chest while Jordan was holding him.

Dade broke loose and ran straight toward me. I saw him collide with Rodnie Stewart and fall to the ground near the paint storage area. Sergeant Flowers hollered for help. I think there was so much noise that he didn't think the other guards in the Housing Unit heard him, so he told me to call base. He was on his way to break up the fight when he told me to call base. I immediately went into the office, picked up the phone, and called base.

A sergeant at the base picked up the phone. I told him there was a fight in Housing Unit 5A. He said something like, "OK," and I hung up the phone.

While I was at MSP, I was a clerk in the captain's office right next to the base. They have a radio base unit with a table-top microphone.

I don't think I said anything about a man being down. I just said there was a fight in Housing Unit 5-A and the guards need help.

I stepped out of the office and watched as Sergeant Flowers was taking Stewart down the steps. Dade was

lying right where he had fallen, and was bleeding from his mouth and through his shirt. When Captain Eberle arrived, I went back to the office.

A few days later I was questioned in the Captain's office by investigators Brooks and Dearixon. They asked me if I saw the murder, and I told them I didn't because I was concerned about my safety. I knew that Jordan and O'Neal were in the Aryan Brotherhood, and if I said I saw them do it, they could easily have me killed.

When I talked to Brooks and Dearixon, I did not know that Lloyd Schlup had been accused of being the guy who held Dade while O'Neal stabbed him. I told them that Sergeant Flowers told me to call base, and that I followed his order.

I never saw Lloyd Schlup at the scene of the crime. When I called base, it was within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It happened very fast.

I have been out of prison since January 29, 1986. I have never been contacted by Lloyd Schlup or anyone acting on his behalf since the day Arthur Dade was stabbed. I remember Lloyd, but we were not friends at MSP. The first person to contact me about this was an investigator who said she was working for Sean O'Brien. She called me about three days ago, and I agreed that I would see Mr. O'Brien and talk to him about what I saw. Mr. O'Brien called me later that night and I gave him directions to my house.

On exhibit one, which is the floor plan of Housing Unit 5A, I drew an "X" showing about where I stood when I saw the stabbing, and I indicated the general area where I saw the attack take place. It could have happened a few feet in either direction, from where I drew the circle. I also drew an X where I saw Dade fall, and where the telephone is that I used to call the base.

Affidavit Exhibit 2 is a picture of Randy "Rocky" Jordan, the man I saw hold Dade while Robert O'Neal stabbed him. Affidavit Exhibit 3 is a picture of Robert O'Neal, the man I saw stabbing Dade while Jordan held him. Affidavit Exhibit 4 is a picture of Rodnie Stewart, the man who Flowers took downstairs. Affidavit Exhibit 5 is a picture of Lloyd Schlup. I did not see him on the walk at all when Dade was stabbed.

If I had been contacted before Schlup's trial, I would have told his attorney that he was not there when Dade was stabbed, and I would have testified that I called base within seconds after Dade hit the ground. I might have been reluctant to snitch on Jordan and O'Neal. I'm not afraid now because I haven't been in prison for more than 7 1/2 years, and I have been working steadily ever since. I have no intention of going back to prison.

I have read this affidavit, and it is the truth.

/s/ John L. Green
John L. Green

County of Washington
State of Kansas

Subscribed and sworn before me this 7th day of September, 1993.

/s/ Marilyn A. Morgan
My appt. expires 9-13-93.

Affidavit Exhibit 2

This is Randy (Rocky) Jordan, the man who held Dade while O'Neal stabbed him.

/s/ John L. Green
9-7-93

Affidavit Exhibit 3

This Robert O'Neal, the man who stabbed Dade while Jordan held him.

/s/ John L. Green
9-7-93

Affidavit Exhibit 5

I recognize this man as Lloyd Schlup, I did not see him anywhere around when Dade was stabbed.

/s/ John L. Green
9-7-93

Affidavit Exhibit 4

I recognize this man as Rodney Stewart, the man Sgt. Flowers took down stairs after Dade was stabbed.

/s/ John L. Green
9-7-93

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner, v. PAUL DELO, Superintendent Potosi Correction Center, Respondent.	)	Cause No. 4:92CV00443

ORDER

Upon careful consideration of Petitioner's Motions, the materials filed in support thereof and Respondent's Suggestions in Opposition,

IT IS HEREBY ORDERED that petitioner's Motion Pursuant to Rule 59(E) to Set Aside Order Dismissing Petition for Writ of Habeas Corpus is **DENIED.**

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion Pursuant to Rule 59(E) to Set Aside Order Dismissing Petition for Writ of Habeas Corpus is **DENIED.**

Dated this 13th day of September, 1993.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals,
Eighth Circuit.

Lloyd E. SCHLUP, Appellant,

v.

Paul K. DELO, Appellee.

No. 93-3272.

Submitted Nov. 3, 1993.

Decided Nov. 15, 1993.
Order Denying Suggestion for
Rehearing En Banc and Motion
for Stay Nov. 17, 1993

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Lloyd Eugene Schlup, a Missouri death-row inmate, requests a stay of execution and reversal of the district court's judgment denying his second petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court[1] dismissed Mr. Schlup's second petition on August 23, 1993, and denied his subsequent Fed.R.Civ.P. 59(e) motion to set aside the dismissal order. The district court's final ruling came on September 13, 1993, and Mr. Schlup's appeal and motion for a stay of execution pending the resolution of his appeal followed.

The district court dissolved its stay of execution on September 15, 1993, in conjunction with its final rulings on the second petition. After a hearing, we denied the

---

[1] The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

motion for stay pending appeal. Schlup v. Delo, No. 93-3272, 1993 WL 409815, 1993 U.S. App. LEXIS 26748 (8th Cir. Oct. 15, 1993). We now vacate that opinion and consider a renewed request for stay and the merits of Mr. Schlup's appeal.

In support of his second petition for habeas relief, this appeal, and the renewed request for stay of execution, Mr. Schlup tendered to the district court and now tenders to this court several affidavits and statements, mostly from present or former prisoners, purporting to be newly discovered evidence tending to establish that he was not present at the scene of the murder for which he was sentenced to death. He also renews his reliance on a videotape, offered at trial as part of an alibi defense, showing his presence in the dining room near the time of the murder. In other words, appellant says he could not have been present at the assault and is actually innocent of the crime.

I.

In his second petition, Mr. Schlup asserts a number of constitutional claims not raised, or raised and denied in his first petition. Thus, these allegations constitute either successive or abusive uses of the writ, 28 U.S.C. § 2244(b), and may be considered by this court only under limited circumstances. Sawyer v. Whitley, ___ U.S. ___, ___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992).

> Unless a habeas petitioner shows cause and prejudice, see Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), a court may not reach the merits of: (a) successive claims

> which raise grounds identical to grounds heard and decided on the merits in a previous petition, Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986); (b) new claims, not previously raised which constitute an abuse of the writ, McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); or (c) procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims. Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). These cases are premised on our concerns for the finality of state judgments of conviction, and the "siginficant costs of federal habeas review." McCleskey, supra, at 490-91, 111 S.Ct. at 1468; see, e.g., Engle v. Isaac, 456 U.S. 107, 126-128, 102 S.Ct. 1558, 1571-1572, 71 L.Ed.2d 783 (1982).

Id. (parallel citations omitted).

Mr. Schlup seeks to establish "cause and prejudice" or, in the alternative, seeks to establish his "actual innocence" of the crime as a means of obtaining federal court review of his constitutional claims. The district court reviewed and denied his cause and prejudice allegations. We agree with this result and adopt the well-reasoned opinion of the district court in this regard.

II.

A. Procedural Bar

Under a second federal habeas review of a petitioner's state court conviction, a claim of actual innocence requires a dual analysis. First, we must consider Mr. Schlup's attempt to invoke the rule announced in

Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) that even if a petitioner cannot meet the cause and prejudice standard, a federal court may examine the merits of a constitutional claim if failure to do so would result in a miscarriage of justice. Id., at 454, 106 S.Ct. at 2627. A petitioner "may make the requisite showing by establishing that . . . he has a colorable claim of factual innocence." Id. The contours of this qualification were more clearly delineated by the Supreme Court in Sawyer v. Whitely, which referred to the test as the miscarriage of justice or "actual innocence" exception. Sawyer, ___ U.S. at ___, 112 S.Ct. at 2519.

In this context, actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrara v. Collins, ___ U.S. ___, ___, 113 S.Ct. 853, 862, 122 L.Ed.2d 203 (1993). Thus, the question is: Has this appellant established "actual innocence" as defined by the Supreme Court? We think not, at least under the test this panel must apply.

Sawyer dealt with the punishment phase of the criminal proceeding as opposed to the guilt or innocence phase of the trial. Therefore, appellant argues, with some justification, that Sawyer announced only a test for analyzing the fairness of the death penalty portion of a trial. And, the Supreme Court did say, in Sawyer, with regard to guilt or innocence:

> Our standard for determining actual innocence was articulated in Kuhlmann as: "[T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' "

Sawyer, ___ U.S. at ___, 112 S.Ct. at 2519, n. 5 (citations omitted).

On the other hand, Sawyer says that "actual innocence" under the death penalty phase of a case must be determined by considering whether a "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id., at ___, 112 S.Ct. at 2523. Says appellant, this seemingly higher (penalty) test is necessary because the amorphous concept of being actually "innocent of death" requires a more objective standard. Id., at ___, 112 S. Ct. at 2519-20. In other words, in the context of guilt or innocence of the crime itself, the concept of "actual innocence" is easier to grasp. Id., at ___, 112 S.Ct. at 2520. Thus, the more subjective Kuhlmann test is sufficient.

Whatever the merits of appellant's contentions, we do not write on a clean slate. We must reject appellant's argument because in this circuit "the new standard [required by Sawyer] applies equally to challenges to a conviction, not just challenges to a death sentence." McCoy v. Lockhart, 969 F.2d 649, 651 (8th Cir.1992). And, the imprimatur of this court en banc was stamped on the McCoy holding in Cornell v. Nix, 976 F.2d 376 (8th Cir.1992) (en banc), cert. denied, ___ U.S. ___, 113 S.Ct. 1820, 123 L.Ed.2d 450 (1993). Accordingly, we make our

determination of whether Mr. Schlup's claim of actual innocence opens the gateway to our consideration of his constitutional claims on that basis.

Before reviewing the gateway evidence now advanced by Mr. Schlup, we consider the presence or absence of any constitutional error at the trial for which relief could be granted. The dissent contends that there was constitutional error in the form of "utter ineffectiveness of Schlup's trial counsel" and that but for this error "the jury would have received the full picture of Dade's murder, and if it were to credit the evidence it would have no choice but to acquit." The dissent barely mentions that, although the district court found the claim of ineffective assistance to be procedurally barred, we disregarded this holding and considered the merits of this ineffective assistance claim in the appeal of Mr. Schlup's first petition for habeas relief. Schlup v. Armontrout, 941 F.2d 631, 638-42 (8th Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1273, 117 L.Ed.2d 499 (1992). We found that under the test announced in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), Mr. Schlup's counsel was not ineffective at either the guilt or penalty stages of the state trial proceeding. Schlup, 941 F.2d at 639. We see no reason to change this result even if we consider the evidence Schlup now presents.

As at the first habeas, Mr. Schlup faults his counsel, Mr. Bushmann, for failing to sufficiently investigate the facts surrounding the murder of Arthur Dade. The dissent agrees. This allegation is erroneous and unfair.

There were three inmates involved in the murder. The three lawyers representing the accused worked together on parts of their investigations. Mr. Bushmann spearheaded the discovery and defense preparation. He arranged and participated in the taking of thirty-eight depositions including those of every guilt witness who testified at trial and who was directly related to the prison. It was Mr. Bushmann's persistence that confirmed the existence of the dining room videotape now used by Mr. Schlup in his effort to show actual innocence. Mr. Bushmann also determined through discovery that one hundred persons were interviewed by prison investigators and appears to have obtained, for review, the tapes or transcripts of all the statements resulting from these inquiries. The trials of the other inmates occurred prior to Mr. Schlup's trial and Mr. Bushmann claims to have reviewed the crucial portions of this trial testimony in preparation for Mr. Schlup's defense. The problem does not seem to be deficiencies in trial preparation by Mr. Bushmann but, rather, the changing nature of the information presented by some of the individuals present at or near the deadly assault.

At trial, as noted by the district court, two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly admissible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility. Witnesses' credibility, however, is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding. Federal habeas, as explained in Herrera, does not provide a forum for the retrial of a

convicted felon. Herrera v. Collins, ___ U.S. ___, 113 S.Ct. 853, 860-61, 122 L.Ed.2d 203 (1993). So, even if we disregard the source of the new evidence, the eleventh-hour nature of the information, and a presentation coming almost six years after the trial; it is simply not possible to say that the appellant has shown by clear and convincing evidence that but for a constitutional error no reasonable jury would have found him guilty. Therefore, there is no basis for sustaining the motion for stay, Delo v. Blair, ___ U.S. ___, 113 S.Ct. 2922, 125 L.Ed.2d 751 (1993), or for reversing the district court.

Even so, we will discuss the "newly discovered" evidence presented by Mr. Schlup. This information comes in the form of written statements, affidavits, and a timed analysis of the videotape taken in the dining room. We have now heard oral argument on these matters twice.

The major thrust of Mr. Schlup's purported showing of actual innocence involves his alibi defense. Through use of the videotape, timed on a second-by-second basis, Mr. Schlup claims that he could not have been at the murder scene. He was, he claims, in the dining room at the time.

Mr. Schlup primarily relies upon two affidavits, one from a former prisoner and one from a former employee at the institution.[2] The latter document is dated October

[2] At oral argument, the state contended that the employee was discharged. The petitioner claims he retired. We find nothing in the record either way.

26, 1993, eight days before we heard oral argument on the merits of this appeal.

John L. Green, an inmate at the Missouri Prison in Jefferson City at the time of the murder, in an affidavit dated September 7, 1993, states that he was "standing near Sergeant Flowers" at the lever box that opens the cells to unit 5A and from such position saw the murder. He further says that Sergeant Flowers directed him to call "base" to report the fight and that he immediately went into the office and made the call.

In conjunction with this new information, the affidavit of Robert Faherty, a former lieutenant at the prison, is presented. He places Mr. Schlup in his presence in a corridor to the dining hall for a two and a half to three-minute period as Mr. Schlup proceeded from housing unit 5A, the location of the murder, to the dining hall.

The videotape is then presented to show Mr. Schlup arriving at the dining hall first in line. According to the videotape, the corrections officers depart form the hall one minute and five seconds later, purportedly as a result of a call from "base" reporting the assault. This, Mr. Schlup contends, shows that he had left the housing unit before the assault occurred. Since Mr. Schlup arrived, according to Mr. Faherty's calculation, at least three and a half to four minutes after leaving the housing unit, and, the assault occurred, according to Mr. Green's statement and the videotape, one and a half to two minutes prior to his arrival at the dining room, Mr. Schlup has an alibi. This was the same defense Mr. Bushmann attempted to establish at trial.

However, Mr. Green has made two prior statements. He told prison investigators that on February 3, 1984, the day of the murder, he was in the office at the housing unit, not next to Sergeant Flowers at the lever box some distance away, and that he did not observe the murder at all. he did state that he called "base" for help but on a different timing sequence. Of more importance is Mr. Green's testimony under oath at the Rodnie Stewart trial. Mr. Stewart was accused, along with Mr. Schlup and Mr. O'Neal, of the crime and was tried over a year prior to Mr. Schlup. On September 5, 1984, Mr. Green testified under oath that he was in the office, heard the words "fight-fight," "got up and . . . went to the door [of the office]," could see Sergeant Flowers at the lever box, saw Dade running toward the office when Dade and Stewart collided and fell to the floor. Mr. Green said he saw no actual fight take place. He then testified that he went into the office to wait for further instructions. He made no mention in his testimony of calling "base". Thus, neither of these earlier presentations fully support Mr. Green's present statement. Indeed, there are crucial differences.

Also, Mr. Faherty has testified under oath on two prior occasions. His deposition was taken by Mr. Bushmann and the lawyers for Mr. O'Neal and Mr. Stewart on June 29, 1984, and he testified at Mr. Schlup's December 1985 trial. In both instances, Mr. Faherty has Mr. Schlup yelling out a window near the corridor to the dining room and then passing with the "first wave" of prisoners immediately into the dining room. Specifically, Mr. Faherty testified that he was temporarily on post at door T-3 located at the end of the corridor leading from the housing unit to the dining hall for only ten to fifteen

seconds. At this location and during this time period, he saw Mr. Schlup yell out the window and told Mr. Schlup to move along toward the dining room which "he [Schlup] did." Mr. Faherty testified that he also immediately moved to the dining room after his ten to fifteen second stop at T-3 because the dining room was really his assigned post. By all accounts, the walking time from T-3 to the entrance of the dining room is no more than twenty-five to thirty seconds.

Also of importance, in this context, is the testimony of Sergeant Peoples who was manning "base" during the relevant time period. He testified without equivocation that it was Captain Eberle, one of the officers posted near the scene of the murder, and not prisoner Green, who called "base" with news of the stabbing. Peoples testified that he immediately broadcast an alarm to prison officers, including those in the dining room who are seen responding to the call on the videotape.

Thus, in the record and in the discovery, a much different timing sequence is established, one that provided Mr. Schlup ample time to participate in the murder and make his way to the dining hall. This was, of course, the state's theory at the trial and a theory compatible with the jury verdict.

With the recent Faherty statement, we are asked on appeal to consider evidence that the district court did not have an opportunity to pass upon. Further, Mr. Faherty testified in Mr. Schlup's trial, as indicated, so it cannot be said that his affidavit is newly discovered evidence as were the affidavits considered in Herrera. We must also observe that in a civil context dealing with a motion for

summary judgment, we have held that we will not allow an affidavit in conflict with earlier sworn testimony to create an issue of fact. Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361 (8th Cir.1983). We believe that the same rule should apply in the context of habeas litigation, a civil action.

While it is evident that there are some inconsistencies between Mr. Faherty's affidavit and his trial testimony, for the most part, the affidavit simply is an effort to embellish and expand upon his testimony given under oath in Mr. Schlup's trial. This is not the type of newly discovered evidence contemplated in Herrera, and presents an entirely different issue of whether some seven years after a trial the court should permit witnesses to come in and add to, modify, or embellish their earlier testimony. We believe that a habeas court should not permit retrial on such a basis.

The dissent also emphasizes other parts of Mr. Schlup's present version of the facts in its attempt to advance the probability that, but for his attorney's incompetence, no reasonable jury would have found Mr. Schlup guilty of the murder. Mr. Schlup purports to present eyewitnesses who either didn't see him at the assault or who now implicate another inmate, Randy Jordan.

The dissent picks and chooses from among Mr. Schlup's several new statements and affidavits, see dissent n. 1, and finds some of them incredible because they "are too inconsistent with" the statements from some of the other newly presented eyewitnesses. The dissent also ignores or minimizes and excuses contrary statements given by some of these same individuals when the crime

was investigated prior to trial. Indeed, three of the new statements credited by the dissent, in addition to the Green affidavit, those by Lamont Griffin-Bey, Donnell White and James Pierce, are inconsistent with prior interviews given during the investigation of the crime. At that time, White and Pierce denied having witnessed the murder at all. As the dissent concedes, Griffin-Bey, who now identifies Robert O'Neal and Rodnie Stewart and finds Mr. Schlup absent from the attack, stated at the time of the contemporaneous investigation that he didn't "know none of those dudes." And, later, he refused to further comment on what happened at the time of the murder.

Thus, Mr. Schlup, like Herrera, attempts to seek a federal court retrial of his state court prosecution and falls well short of showing "by clear and convincing evidence [that] no reasonable juror would find him [guilty of murder.]" Sawyer, ___ U.S. ___, 112 S.Ct. at 2523.

B. Due Process

The second prong of Mr. Schlup's "actual innocence" allegation requires our consideration of the claim as, itself, a constitutional violation. This requirement arises from the assumption by the Supreme Court in Herrera made for the sake of deciding that particular case, "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Herrera, ___ U.S. at ___, 113 S.Ct. at 869. This language is from Justice Rehnquist's opinion

concurred in by Justices Scalia and Thomas. Justice O'Connor in her concurrence, joined by Justice Kennedy, compared and contrasted this language with that from Justice White's concurrence and Justice Blackmun's dissent, and stated that resolution of this issue assumed by Justice Rehnquist was neither necessary nor advisable in this case. She emphasized that such "federal proceedings and relief – if they are to be had at all – are reserved for 'extraordinarily high' and 'truly persuasive demonstrations of "actual innocence" ' that cannot be presented to state authorities." Id., at ___, 113 S.Ct. at 874.[3] The decisive issue in her concurrence as well as in Justice

---

[3] As the author of this opinion for that court, I express, separately, without the concurrence of Judge John R. Gibson, my belief that Mr. Schlup cannot, under the holding in Herrera, seek federal habeas relief based upon this "free standing" claim without first seeking executive clemency from the Governor of Missouri. It is my view that in Herrera, at least five members of the Supreme Court (Chief Justice Rehnquist, Justices O'Connor, Kennedy, Scalia, and Thomas) would permit a federal habeas remedy based upon an "actual innocence" claim arising from newly discovered evidence rather than trial error (assuming such a remedy even exists when the question reserved for future consideration is answered) only "if there were no state avenue open to process such a claim." Herrera, ___ U.S. at ___, 113 S.Ct. at 869, 874. While Schlup argues that the word "process" included in the Herrera formulation by the five member majority means a state court proceeding, such an interpretation is untenable given the extensive discussion of executive clemency in both the opinion of the Court authored by Chief Justice Rehnquist and the concurrence written by Justice O'Connor. Indeed, Justice O'Connor, in her discussion, of the "assume[d]" constitutional right, points out that the reserved question "may never require resolution at all" if "the safeguards of clemency and pardon fulfill their historical mission." Id., at ___, 113 S.Ct. at 874.

Rehnquist's opinion, was that the petitioner had failed to make a persuasive showing of actual innocence. Justice Rehnquist stated that the showing fell short of that which would have to be made to trigger the constitutional claim which he assumed existed.

Herrera points to the resolution of Schlup's claim. As we have just discussed in part II-A, when the new evidence itself is analyzed with its inconsistencies and weaknesses, and considered together with the evidence before the jury at the trial of the case, the extraordinarily high burden is not met, and there is no truly persuasive demonstration of actual innocence.

III.

For the reasons stated above, we conclude that the motion for stay of execution should be denied and the order of the district court affirmed.

HEANEY, Senior Circuit Judge, dissenting.

Lloyd Eugene Schlup has presented truly persuasive evidence that he is actually innocent of the murder of his fellow inmate Arthur "Stump" Dade. Five eyewitnesses to the murder have provided sworn testimony that Schlup neither participated in the murder nor was present at the time. Both Schlup and his mother begged trial counsel (and subsequent counsel) to interview inmates housed in cells near the site of the murder, but none did so. Consequently their testimony was not heard by the jury that convicted Schlup and sentenced him to death. Moreover, their testimony has not been heard in open court since the trial because neither the Missouri courts

nor the federal courts have been willing to grant Schlup an evidentiary hearing in which this new evidence could be heard and evaluated. This truly persuasive evidence of his innocence allows Schlup to clear the court-imposed procedural hurdles and to address the merits of his claim that trial counsel was ineffective for failing to interview these eyewitnesses. The court errs today in not remanding this matter for an evidentiary hearing, as it did in ruling on Schlup's first petition, and I must therefore dissent.

I

Schlup presents new evidence of his actual innocence of Dade's murder that is truly persuasive. The new evidence falls primarily into two categories. First, and most important, are the affidavits of eyewitnesses to Dade's murder which state unequivocally that Schlup was not present at and did not participate in Dade's murder. Second, Schlup presents new evidence that substantiates his videotaped alibi, i.e., that he was in the dining room at the time of the murder.

A

Schlup presents five affidavits of eyewitnesses to the murder, none of whom were contacted by Schlup's defense counsel, none of whom testified at trial, and all of whom appear willing to give their testimony in open

court.[1] These witnesses describe firsthand the murder of "Stump" Dade, indicating unequivocally that Lloyd Schlup was not a perpetrator and was not even present. This testimony not only satisfies the threshold question of "actual innocence" but persuasively demonstrates the utter ineffectiveness of Schlup's trial counsel in failing to investigate the circumstances of Dade's murder.

John Green testifies by affidavit that while standing outside the unit clerk's office the morning of February 3, 1984, he witnessed Dade's murder:

> I looked down one walk, and I saw Randy Jordan holding Arthur Dade. Jordan was standing behind Dade, and had Dade's arms pinned to his sides from behind. I saw Robert O'Neal stab Dade several times in the chest while Jordan was holding him.
>
> * * *
>
> I never saw Lloyd Schlup at the scene of the crime. . . .
>
> * * *
>
> If I had been contacted before Schlup's trial, I would have told his attorney that he was not there when Dade was stabbed. . . .

---

[1] A number of other persons who stated that they were eyewitnesses to Dade's murder submitted affidavits or sworn testimony indicated that Schlup was not present at the time the murder occurred. I have not placed significant reliance on these statements either because the affiants indicate an unwillingness to testify at an evidentiary hearing or because the statements are too inconsistent with the statements of all of the other eyewitnesses (those newly presented by Schlup and those of the prosecution).

Affidavit of John L. Green, at 2, 4, 6 (Sept. 7, 1993). O'Neal has been convicted for his role in Dade's murder, as has Rodnie Stewart, whom Green also saw on "one walk" at the time. Green has been out of prison since 1986, so contrary to the state's assertion he does have something to lose by perjuring himself. He nonetheless comes forward with persuasive evidence of Schlup's innocence, evidence never heard by the jury that sentenced Schlup to death, and he deserves to be heard in open court.[2]

Donnell White was walking to the dining room "very close to" "Stump" Dade when "three white guys" came from the opposite direction:

> One of them had a tumbler of something that he threw in Stump's face. One or two of the other ones started sticking Stump with an ice-pick-type knife. They both jumped him, but I could tell for sure that one guy was stabbing him, and I'm not sure about the other guy. One broke off to the kitchen, and the other threw the knife out the window. The guy who threw the liquid in his face just backed off. The liquid was steaming, and I could smell bleach, so I think it was a mixture of bleach and boiling water. . . . I have

[2] The state argues that Green's latest affidavit is inconsistent with his testimony in the trial of Rodnie Stewart. Green then indicated that he had not seen the stabbing itself. While this inconsistency would need to be explored on remand, I believe it is fairly easily explained. Green was at that time still in prison and justifiably afraid for his well-being. See infra n. 11. It was probably in his interest to say that he had arrived just after the stabbing as he then indicated. Now that he has been out of prison for seven years, he no longer is afraid to let the truth be known.

> seen Lloyd Schlup, and I know who he is. He is definitely not one of the guys I saw jump Arthur Dade, who I knew as "Stump." I know that one of the three men involved has never been prosecuted, and I know that Lloyd Schlup is innocent.

Affidavit of Donnell D. White, at 2, 3 (Apr. 21, 1993) (emphasis added). White describes "the third guy" as "a white guy with tatoos [sic] all over his arms." Id. at 2. Lieutenant Faherty indicates that Randy Jordan was "covered" with tattoos. Affidavit of Robert Faherty, at ¶ 7 (Oct. 26, 1993). White's testimony is otherwise consistent with that of the prosecution: Rodnie Stewart was convicted for his role in Dade's murder, which consisted at least in part of throwing a cup of liquid in Dade's face. See State v. Stewart, 714 S.W.2d 724, 725-26 (Mo.Ct.App.1986).

Joseph Beck also attests to Schlup's innocence: "I witnessed the knifing of Arthur 'Stump' Dade. It happened immediately in front of my cell, 3-3 1/2 feet away. Lloyd Schlup was not in sight, not even on the flag, where stabbing took place. Never saw Schlup." Affidavit of Joseph N. Beck (Feb. 5, 1992).

James Pierce was waiting for his friend Wardell Harvey to accompany him to lunch when he witnessed Dade's murder: "I saw two white guys go onto 1-walk. One of them threw a cup of liquid in Arthur Dade's face, and the other one stabbed him. Lloyd Schlup was not involved in the stabbing." Affidavit of James Pierce, at 1 (Apr. 21, 1993). Dade was a black man, and his murder may have been racially motivated. Those involved were alleged to be members of a white supremacist group in

the prison. Pierce is also black and adds the following: "I have no reason to lie for a white guy. . . . I know for certain that Lloyd Schlup did not kill Arthur Dade, and that he was not even present when Dade was killed." Id. at 2.

LaMont Griffin-Bey was also on his way to lunch when he witnessed Dade's murder: "The first thing I saw of the fight was Rodney Stewart throw liquid in Arthur Dade's face, and O'Neal stab him. . . . Lloyd Schlup was not present at the scene of the fight." Affidavit of LaMont Griffin-Bey, at 2-3 (Apr. 7, 1993). Griffin-Bey made contemporaneous statements consistent with this affidavit. He told prison investigators that he "saw one man throw some water in his face. And when he went down the other man started hitting him with a knife." Excerpt of Transcript of Inmate Interviews, Exhibit 1A in Support of Petitioner for Writ of Habeas Corpus (interview of LaMont Griffin-Bey).

Although he failed at that time to identify either of Dade's assailants (stating initially that he "don't know none of those dudes" and later stating an unwillingness to comment on that because "this is too serious for me"), Griffin-Bey did indicate that of the two, "Sgt. Flowers grabbed one" and the other got away. Id. It is uncontroverted that Sergeant Flowers detained Stewart at the scene of the murder and that O'Neal ran to the dining room. An earlier affidavit by Griffin-Bey also supports his most recent statement: "I witnessed the knifing of Arthur Dade on [February 3, 1984]. I saw two men and the victim involved in the knifing. I did not seem Lloyd Schlup around the area and I was standing approximately 10 ft.

away from where the incident happened." Affidavit of LaMont Griffin-Bey (Jan. 21, 1992).

Each of these five eyewitnesses[3] was available to be interviewed by trial counsel had he simply noticed their depositions while he was at the prison to depose those on the prosecution's list, yet this was not done. The district court determined it was unnecessary to hear these witnesses in open court, apparently because there is "something suspect about affidavits produced after a long delay" and the "affiants are all fellow inmates who do not necessarily have a strong incentive to refrain from perjuring themselves." Schlup v. Delo, No. 4:92CV00443, slip

---

[3] One additional eyewitness merits mention. According to the transcript of the inmate interviews conducted by prison investigator George Brooks, inmate Ricky McCoy asserted both that there was a "crowd of people" (indicating a generous supply of eyewitnesses to be interviewed by Schlup's trial counsel) and that "[t]here was just only two [perpetrators]. No doubt about it." He then identifies "Neal" as the man who stabbed Dade and a photo of Stewart as the man who threw the cup of water. Excerpt of Transcript of Inmate Interviews, Exhibit 2 in Support of Petitioner for Writ of Habeas Corpus (interview of Ricky McCoy). The panel opinion denying Schlup's initial appeal states that although Schlup's trial counsel reviewed the statements made by Griffin-Bey and McCoy, he decided that their "testimony would be repetitive of the testimony to be presented at trial." Schlup, 941 F.2d at 639. Given that trial counsel presented no eyewitnesses to the murder, it eludes me how their testimony could reasonably be considered repetitive. The record now before us reveals that Schlup's counsel did depose McCoy and that McCoy denied having witnessed the incident. Deposition of Ricky McCoy (June 26, 1984). No one asked McCoy about his prior statement that he had witnessed the murder. Under the circumstances counsel was required to compel McCoy's testimony. See infra at 747.

op. at 12 (E.D.Mo. Aug. 23, 1993). Of course, not all the affiants are currently fellow prisoners, as noted above,[4] but the district court's reasoning is unpersuasive in any event, given the facts of this case. The murder for which Schlup has been convicted occurred in prison. It follows that the eyewitnesses (other than the prison guards) would be fellow prisoners. These affidavits were not presented earlier because Schlup's trial counsel (and earlier post-conviction counsel) never interviewed his fellow inmates, at least two of whose statements to prison investigators revealed their status as eyewitnesses. In addition, Lieutenant Faherty indicates in his affidavit that several of these prisoners, particularly John Green and Joseph Beck, are reliable witnesses, unlike many prisoners. Affidavit of Robert Faherty, at ¶ 7 (Oct. 26, 1993). Essentially what the district court and implicitly this court require is that one wrongly convicted of a murder in prison present innocents as eyewitnesses and be able to afford competent counsel from the beginning. Schlup could, of course, do neither. Rather than discount these eyewitnesses' statements sight unseen, the district court should have granted Schlup the evidentiary hearing he requested, and then these witnesses could be subject to examination by the state and their credibility could be accurately determined.

---

[4] John Green's affidavit was not part of the record before the trial court, nor was the transcript of his testimony in Rodnie Stewart's trial. The record has expanded repeatedly before our court at the request of both the parties and the court. Lieutenant Robert Faherty's affidavit has been added, as have the thirty-nine depositions (of thirty-eight individuals) taken from the prosecutor's files.

The state argues that Schlup's counsel was effective and notes specifically that he deposed thirty-eight witnesses. These depositions were done collectively by Schlup's, Stewart's, and O'Neal's attorneys, in the presence of the prosecutor, over a period extending from June 26 to July 10, 1984. Of the thirty-eight witnesses, fourteen were inmates and the remaining twenty-four were either prison personnel or other law enforcement officers. Eight of the fourteen inmates refused to answer questions, and some of them relied on the Fifth Amendment.

Other inmates were discussed during the deposition of corrections officer George Brooks, who indicated that he had interviewed all of the inmates on walks one through four and that none of these inmates had any knowledge of the incident. Deposition of George Brooks, at 9 (July 2, 1984). Schlup's counsel apparently accepted this testimony as fact and failed to interview the inmates on these walks.[5] This is ample evidence of his

---

[5] No evidence in the record supports the majority's assertion that Schlup's trial counsel "arranged" for the taking of these thirty-eight depositions. It appears that the only witnesses deposed were those proffered by the state. If it is true, as the majority suggests, that trial counsel read the statements of the one hundred inmates on walks one through four, he has even less excuse for failing to interview individually Griffin-Bey and McCoy, who both told prison investigators that they had witnessed Dade's murder. Regardless of whether he read the statements he was obligated to interview these potential eyewitnesses individually. His failure to do so is the essence of Schlup's claim of ineffective assistance. Lest the point be lost in the majority's recitation of what trial counsel did do, let me repeat: at no point before, during, or after trial did Schlup's counsel interview any of the one hundred potential

ineffectiveness, but he was further ineffective in accepting inmates' statements that they would not testify because they had taken the Fifth Amendment.

Our court set the standard for attorney competence in investigating witnesses and compelling their testimony in Eldridge v. Atkins, 665 F.2d 228, 235(8th Cir.1981), cert. denied, 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982):

> When a man's liberty is at stake counsel owes a greater duty than to simply accept someone's hearsay statement that the witness would rather not testify. A lawyer's duty to defend rises to a greater measure of responsibility. A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court in order to allow the judge to use his power to persuade the witness to present material evidence.

Competent counsel are required, as indicated above, to use every means necessary to persuade these witnesses to present material evidence. A witness who pleads the Fifth Amendment

> is not exonerated from answering merely because he declares that in so doing he would incriminate himself – his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if "it clearly appears to the court that he is mistaken."

---

eyewitnesses made known to him by the state. In this his representation fell below the level required by the Sixth Amendment.

Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951) (citations omitted). Schlup's counsel did not give the court that opportunity. He did not interview eyewitnesses to the murder who would have testified that Schlup was not present and did not participate, and he did not compel the testimony of those who refused to testify. His performance violated Schlup's constitutionally protected right to counsel.

In addition to the eyewitness testimony discussed above, Schlup also presents this court with new evidence in support of the alibi defense he presented at trial. That defense consisted of the testimony of several prisoners that Schlup had walked ahead of them to the dining room, the testimony of Lieutenant Faherty that he had spoken to Schlup outside the dining room, and the videotape that shows Schlup as the first inmate to arrive in the dining room.

The importance of the videotape is in the time lapse between when Schlup arrived, when the guards received a call over their radios about the attack on Dade, and when O'Neal and Jordan arrived. No one disputes that Schlup was first in line for lunch on February 3, 1984. The surveillance videotape of the dining room confirms this fact. According to the videotape, one minute and five seconds elapsed from Schlup's entrance into the dining room until the guards received a radio call about the fight. Twenty-six seconds after the guards responded to the radio call O'Neal ran into the dining room dripping blood. Prison investigator George Brooks testified at trial that one could run from the scene of the crime to the dining room in just over thirty seconds, with a brisk walk taking over a minute.

At trial it was believed that the radio call to which the dining room guards can be seen responding was made several minutes after the stabbing had occurred. Captain Eberle testified that he had radioed for help when he first arrived on the scene, which was several minutes after the stabbing. This would arguably have given Schlup time, as the state asserted in its closing arguments, to get to the dining room one minute before the call went out over the radio.

Schlup presents new evidence on this point, however, evidence that apparently was available at the time of trial but was not presented to the jury due to the ineffectiveness of Schlup's trial counsel. John Green the eyewitness whose testimony is discussed above, did more than simply watch the stabbing on February 3. Sergeant Flowers called out for someone to call the base, and Green did just that. He told the prison investigators about this phone call when he was first interviewed: "I heard Sgt. Flowers calling for officers cause they had had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did." Excerpt of Transcript of Inmate Interviews, Exhibit 4A in Support of Petition for Writ of Habeas Corpus (interview of John Green). This phone call took place just after he saw "inmate Dade fall right there in front of the office." Id.

Green's affidavit provides greater detail: "When I called base, it was within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It

happened very fast." Affidavit of John L. Green, at 4 (Sept. 7, 1993).[6]

Lieutenant Faherty has also expanded on his earlier trial and deposition testimony. He testifies that he was on duty at T-3, a door about halfway between Schlup's cell and the dining room that is kept locked except when inmates are moving from one place to another. When T-3 was opened from base control at his direction, he saw Schlup "coming down the corridor. . . . He was walking a leisurely pace with his hands in his pockets." Affidavit of Robert Faherty, at ¶ 4 (Oct. 26, 1993). Schlup stopped at a window to yell at someone outside, Faherty reprimanded him, and Schlup walked to T-3. Faherty "patted him down, and he went to the dining room. [Schlup] was not perspiring or breathing hard, and he was not nervous." Id. Faherty was relieved from T-3 shortly after Schlup passed through, and Faherty then went to the dining room. He estimates that Schlup was in his presence (presumably from the corridor the other side of T-3 and into the dining room) for two-and-a-half to three minutes. It

---

[6] Sergeant Peoples, who was the dispatcher at base control at the time of the stabbing, indicated that he had been called by Captain Eberly. Deposition of Ellis R. Peoples, at 9-10 (July 5, 1984). He was not asked about John Green or whether any inmate had called in the fight. He did testify that he kept a log of this incident, and Lieutenant Faherty likewise testified in his deposition of the existence of certain logs. None of these appear in the record, and there is no evidence that they were ever examined by Schlup's trial counsel. One of the difficulties in this case is ascertaining absolute times (it all occurred "about noon"), and these logs would seem to be useful in this regard. The absence of these logs is but further evidence of the ineffectiveness of Schlup's trial counsel.

would take Schlup another thirty seconds to walk from his cell to where he first entered Faherty's line of sight. Id. at ¶ 6. Counting the minute in the dining room prior to the radio call (when he was presumably in Faherty's presence as well), Schlup left his walk at least three to three-and-a-half minutes before the radio call.[7] If the radio call came in response to John Green's phone call, it is impossible, as Faherty asserts, for Schlup to have participated in Dade's murder.

Given the timing of this call for help and the evidence presented at trial (the videotape, the testimony of Lieutenant Faherty, and the testimony of Brooks on how long it takes to move from the scene of the crime to the dining room), it is not possible that Schlup could have participated in Dade's murder and been in the dining room as the videotape indicates. In short, Lloyd Schlup could not have been in two places at the same time. O'Neal arrived nearly thirty seconds after the radio call, and the prosecution's testimony establishes that he took off at a run. He was followed into the dining room by Randy Jordan. Rodnie Stewart had already been detained.

---

[7] Faherty indicates in his affidavit that it must have been five to five-and-a-half minutes from the time Schlup left his cell to the time of the radio call. This is somewhat inconsistent with the details of both his affidavit and his earlier trial testimony and deposition. Any inconsistency should be explored, and perhaps explained, at an evidentiary hearing. One need only rely on the most conservative estimate of a three-minute lapse to conclude that Schlup could not have participated in Dade's murder.

Meanwhile, as Schlup has maintained since the beginning, he was simply in the dining room eating his fish sandwich.

II

Despite the weight of this new evidence, the court refuses to reach the merits of Schlup's claim that his counsel was ineffective by declaring the issue subject to procedural bar. The procedural hurdles habeas petitioners must clear stem from two sorts of concerns. First, we wish to insure that state courts are given an opportunity to review such claims before we will review them ourselves, and second, we feel that late-blooming claims of error that could have been raised earlier are little more than dilatory tactics by petitioner's counsel. Neither concern is implicated in this case because Schlup has asserted since the beginning that his trial counsel was ineffective for failing to interview eyewitnesses to Dade's murder.

A

Schlup was convicted on December 11, 1985, after a two-day trial.[8] His conviction was affirmed on February

---

[8] The state asserted at oral argument that we should not "retry" this case on habeas and asked what we would tell the jury that sat through this two-week or three-week long trial, implying that we would somehow be showing disrespect to the jury if we found that Schlup deserved a new trial because of trial counsel's failure to present that very jury with exculpatory witnesses. I repeat that Schlup received only a two-day trial. Had trial counsel presented the exculpatory eyewitnesses now

17, 1987, by the Missouri Supreme Court and the United States Supreme Court denied certiorari on June 8 of that year. See State v. Schlup, 724 S.W.2d 236 (Mo.), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 685 (1987). Less then six weeks later Schlup filed for post-conviction relief in the Missouri courts under Rule 27.26 as it then existed. This was the first opportunity that Schlup had to raise the ineffectiveness of his trial counsel because no record had been made which would allow the issue to be raised on direct appeal. Schlup raised the issue loudly and clearly, alleging that his trial counsel was constitutionally ineffective in that he "failed to interview witnesses in support of [his] defense including Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, who were witnesses to the crime of which Petitioner was convicted, and who would have testified that Petitioner was not one of the three inmates involved." Rule 27.26 Motion at 2, Schlup v. State, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., filed July 18, 1987). Schlup also alleged that his "counsel failed to investigate Petitioner's alibi defense and failed to interview Randy Jordan, who Petitioner believes was in fact the third participant in the murder of which Petitioner was convicted." Id. at 3.

An evidentiary hearing was held at which Schlup's trial counsel testified, and the motion court ruled against Schlup, finding that his trial counsel had been effective. See Schlup v. State, No. CV187-3457CC (Circuit Court of

---

presented, the jury would have received the full picture of Dade's murder, and if it were to credit the new evidence, it would have no choice but to acquit.

St. Charles County, Mo., Nov. 6, 1987). The court accepted trial counsel's testimony, and found that the witnesses who were not interviewed were either not made known to trial counsel by Schlup or "were known not to have information which would assist the defense." Id. at 4.

Schlup appealed this adverse decision, specifically alleging that trial counsel was ineffective for not interviewing the aforementioned witnesses. Appellant's Brief at 4, Schlup v. State, 758 S.W.2d 715 (Mo.1988)(No. 70694). The Supreme Court of Missouri ignored this issue when it affirmed the motion court's decision. See Schlup v. State, 758 S.W.2d 715 (Mo.1988) (en banc).

Schlup then raised the issue in his pro se petition for federal habeas filed in the Eastern District of Missouri. His handwritten petition alleges that trial counsel "[d]id not interview inmate John Green; who was the inmate 'clerk' and gave statement to investigators that he put out the phone call to base control." His amended petition prepared by counsel restated the language of the 27.26 motion, alleging that "Petitioner's trial counsel . . . failed to interview witnesses in support of [the] defense including Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, who were witnesses to the crime of which petitioner was convicted, and who would have testified that Petitioner was not one of the three inmates involved." First Amended Petition, Attachment to 11(a)(3) at 1 (¶ A(1)), Schlup v. Armontrout, No. 89-0020C(3) (E.D.Mo. filed March 7, 1989). Schlup also alleged ineffectiveness of trial counsel for failure to call "those persons who would have testified that Petitioner was not the third inmate involved in the murder of which he was convicted" including the aforementioned. Id. at 2

(¶ A(5)). Counsel raised this issue in the briefs filed with the district court as well. See Petitioner's Brief at 9-10, Schlup v. Armontrout, No. 89-0020C(3) (E.D.Mo. May 31, 1989).

The district court ruled summarily and without any basis that the claims raised in paragraphs A(1) and A(5), along with others, were "barred from further consideration" because of Schlup's failure to assert them at trial, to include them in his motion for new trial, to brief them on appeal, or to pursue them in [his] post-conviction proceedings." Schlup v. Armontrout, No. 89-0020C(3), slip op. at 6 (E.D.Mo. May 31, 1989), aff'd, 945 F.2d 1062 (8th Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1273, 117 L.Ed.2d 499 (1992).

Schlup appealed to our court, again arguing that trial counsel had been ineffective for "fail[ing] to investigate and call witnesses, including alibi witnesses, in petitioner's case in chief." Appellant's Brief at 18, Schlup v. Armontrout, 945 F.2d 1062 (8th Cir.1991) (No. 90-1164EM). Rather than remand the matter to the district court so that it could make the initial determination on the merits (and perhaps conduct the evidentiary hearing that Schlup has never had in federal court), we addressed the merits of his claims and found them wanting.

Had we fully explored the alleged procedural default, we would have found it to be nonexistent. Schlup raised the issue to the Circuit Court of St. Charles County, Missouri, and to the Supreme Court of Missouri, but because the Missouri Supreme Court failed to address the issue the district court ruled that Schlup had failed to raise it in that forum. The Missouri Supreme Court's error

was attributed to Schlup, and our ruling only compounded the injustice.

B

We erred in not remanding the case to the district court two years ago. Had we done so, his present counsel, who was appointed immediately following our prior ruling and who is the only truly competent counsel to have represented Schlup since the beginning, would have had an opportunity to develop the record we now have before us and this claim could have been addressed on the merits by the district court as it should have been in the first place.

The only procedural hurdle that remains in Schlup's path is our affirmance of the district court's error in failing to address this claim when it was first presented. There are two routes around this procedural bar. The route pursued in the briefs is the actual innocence or fundamental miscarriage of justice exception to bar, but that exception normally is pursued when the failure to raise the claim earlier can be traced to the petitioner. In this case the fault lies with the federal courts, and the second route around this bar can be remedied most sensibly by this federal court. Justice requires that we correct our prior decision, which we can do by recalling the mandate and remanding the initial petition to the district court for an evidentiary hearing on the merits of the ineffective assistance claim. Recall of the mandate is authorized "to prevent injustice," 8th Cir.R. 41A, and we have done so in the death penalty context in the past. See Simmons v. Lockhart, 856 F.2d 1144 (8th Cir.1988). Schlup

has asserted that trial counsel was ineffective for failing to interview eyewitnesses since the beginning, and it is time that his evidence to support that claim be heard in open court.

III

If we do not recall our prior mandate, Schlup's claims are barred as either successive, abusive, or procedurally defaulted, see Sawyer v. Whitley, ___ U.S. ___, ___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992), but exceptions must be made if a petitioner adequately asserts either cause and prejudice or a fundamental miscarriage of justice, which is also known as the "actual innocence" exception. See id., at ___, 112 S.Ct. at 2518-19. If the evidence Schlup has presented were to stand up in an evidentiary hearing, it would satisfy the actual innocence standard, and we should therefore address the merits of his claim that his counsel was constitutionally ineffective during the guilt phase of his trial. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A

Under the Supreme Court's decisions on actual innocence, the standard to be applied in this case is stated in Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), in which Justice Powell stated the requirement that

> the prisoner must "show a fair probability that, in light of all the evidence, . . . the trier of fact would have entertained a reasonable doubt of his guilt." Thus, the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence.

Id. at 454 n. 17, 106 S.Ct. at 2627 n. 17 (Powell, J., for a plurality) (quoting Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 160 (1970) (footnote omitted)) (emphasis in original). I believe that Schlup has met this standard, but as the majority correctly notes, our court has applied a different standard, essentially reading the Supreme Court's decision in Sawyer as implicitly overruling Kuhlmann in this regard.

In Sawyer, the Supreme Court affirmed the Fifth Circuit, quoting with approval the test adopted by that court:

> "[W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty."

Sawyer, ___ U.S. at ___, 112 S.Ct. at 2523 (quoting Sawyer v. Whitley, 945 F.2d 812, 820 (5th Cir.1991)). The Court then restated the test, changing it markedly in the process, in what has become an all too common sleight-of-hand. Despite its praise for the Fifth Circuit standard (which comes, of course, from Kuhlmann), the Court now requires that one arguing innocence of the death penalty

provide "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id. I also believe that Schlup has satisfied this test, which our court has sua sponte, and in my view erroneously, extended to apply to convictions as well as to sentences. See Appellants' Briefs in Cornell v. Nix, 976 F.2d 376 (8th Cir.1992) (en banc) and McCoy v. Lockhart, 969 F.2d 649 (8th Cir.1992), neither of which argue for the extension of Sawyer. The Fifth Circuit, which was affirmed by the Supreme Court in Sawyer, has not extended that ruling to convictions, ruling instead that the Kuhlmann standard continues to apply to convictions. See Montoya v. Collins, 988 F.2d 11, 13 (5th Cir.) (restricting Sawyer to the sentencing phase and continuing to apply Kuhlmann to the guilt phase), cert. denied, ___ U.S. ___, 113 S.Ct. 1630, ___ L.Ed.2d ___ (1993).

As a panel we are of course bound by Cornell, but if ever there were a case in which the Supreme Court might wish to clarify the law on this issue, this is the one. Schlup has presented a strong case of actual innocence. I believe it meets the Cornell standard, and I believe it is "truly persuasive" as required by Herrera v. Collins, ___ U.S. ___, 113 S.Ct. 853, 869, 122 L.Ed.2d 203 (1993), but the majority does not. What either the majority or the district court, which noted that Schlup presented a stronger case of actual innocence than did Herrera (and the evidence has only increased since the district court's decision), would do if Schlup were simply required to show a "fair probability" of his innocence is not known, but only our court en banc or the Supreme Court can make that happen.

B

Once Schlup clears the procedural hurdles put in place by this court and the Supreme Court, the merits of his claim of ineffective assistance of counsel must be addressed. Schlup alleges that trial counsel's failure to conduct a reasonable investigation of the circumstances surrounding the murder deprived him of his rights under the Sixth Amendment. See Strickland, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Petitioners alleging ineffective assistance of counsel must show both that counsel's performance failed to meet "the standard of reasonableness under prevailing professional norms" and that "but for counsel's ineffective assistance there is a reasonable probability that the result of the trial would have been different." Grooms v. Solem, 923 F.2d 88, 90 (8th Cir.1991). The test for prejudice is substantially easier to satisfy than is the test for actual innocence (which I have already indicated Schlup's evidence satisfies), so the only remaining question is whether the newly presented evidence could, and should, have been discovered by competent trial counsel.

Despite having access to transcripts of prisoner interviews, some of which contained statements of eyewitnesses, Schlup's counsel failed to conduct any reasonable investigation.[9] This court has held repeatedly that failure

---

[9] Schlup's trial counsel apparently failed even to inquire of Stewart's and O'Neal's counsel about potential eyewitnesses. Both of these trials took place before Schlup's and both defense counsel presented eyewitnesses to Dade's murder. Some of those witnesses might not have helped directly, but counsel would have at least become aware that the crime occurred in a

to interview potential alibi witnesses constitutes a lack of competence under Strickland. See, e.g., Grooms, 923 F.2d at 91; Lawrence v. Armontrout, 900 F.2d 127, 129-30 (8th Cir.1990). Failure to interview potential eye witnesses is unquestionably a more egregious failing than failure to interview alibi witnesses. In this case, Schlup offers both eyewitnesses and, at least indirectly, an alibi witness, all of whom would have been uncovered by a reasonable investigation of the circumstances surrounding Dade's murder.

John Green's statement that he had called the base, a statement that certainly would have bolstered Schlup's alibi, was available to Trial counsel in the transcript of prisoner interviews conducted by Brooks.[10] Had counsel then interviewed Green, he could have asked the question that none of the transcripts of prisoner interviews reveals to have been asked of any prisoner: Was Lloyd Schlup present at Dade's murder?[11] counsel would have

---

crowded cellblock and that the possibility of eyewitnesses should be investigated.

[10] I assume that transcripts of the prisoner interviews were available to trial counsel. Were they unavailable, Schlup is entitled to relief under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1967), due to the prosecution's failure to turn over such exculpatory evidence in violation of due process.

[11] George Brooks indicated in his deposition that he only asked the inmates if they had witnessed Dade's murder or anything else unusual on that date. In short, the inmates were being asked by prison guards to "snitch" on fellow inmates when the eyewitnesses were all too aware that the guards were in no position to provide protection from the perpetrators and their cronies. This murder took place in the Special Management Unit, also known as "SuperMax," yet even prison personnel

had further incentive to interview McCoy[12] and Griffin-Bey, who both admitted to prison investigators that they witnessed the crime. They too could have been asked whether Schlup was present.

Even if counsel were not made aware either by Schlup or by prison authorities that there were witnesses to the murder, he was obligated simply by common sense to investigate the possibility. This murder occurred as prisoners were being released from their cells to go to lunch. The existence of witnesses to the murder was as inevitable as their reluctance to cooperate either with prison investigators or with a room full of lawyers and O'Neal.[13] Counsel's failure to investigate these witnesses and the other eyewitnesses was unreasonable under our

---

were fearful of appearing in this area alone. See Deposition of William Rutledge, Associate Warden, at 16, 19 (June 29, 1984). The latest inmate affidavits indicate that they too were afraid to travel alone even to lunch, as evidenced by several of them waiting for friends before walking to the dining room.

[12] Counsel did depose McCoy but the record indicates no effort to interview him outside of the presence of the prosecutor or O'Neal. One purpose of such an interview might have been to reconcile his deposition with his earlier statement to prison investigators. See supra n. 3. Schlup's counsel informs us that McCoy is now dead, so I presume no further explanation will be forthcoming.

[13] Several of the depositions of inmates who refused to answer questions reflect the prosecutor's belief that O'Neal was responsible for the inmates' reticence. It seems quite likely that an interview in O'Neal's presence would not be the most conducive environment in which to gain the cooperation of eyewitnesses, yet the record reveals that Schlup's counsel made no effort to contact eyewitnesses (as opposed to alibi witnesses) individually.

case law, and Schlup is therefore entitled to relief if these witnesses' testimony were to survive the rigors of an evidentiary hearing.

IV

Under Delo v. Blair, ___ U.S. ___, 113 S.Ct. 2922, 125 L.Ed.2d 751 (1993) (per curiam), all that is required for a stay to issue on a second or subsequent habeas petition is that the petitioner present " 'substantial grounds upon which relief might be granted.' " Id. at ___, 113 S.Ct. at 2923 (quoting Herrera v. Collins, ___ U.S. at ___, 113 S.Ct. 853, 873, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring)). In Blair, the Court objected to the issuance of a stay because the district court had stated that the facts in that case mirrored those that the Court had recently rejected in Herrera. This case is distinguishable on a number of grounds.

First, Schlup is not relying exclusively on a constitutional claim of actual innocence, but is using innocence as a gateway to reach the merits of his ineffective assistance claim. Second, the district court indicated that Schlup has presented a stronger case than did Herrera in that Schlup's affidavits do not consist of hearsay but of eyewitness testimony, and Herrera was, in the opinion of the district court, "convicted on the basis of a larger quantity of evidence than was presented at [Schlup]'s trial." Schlup v. Delo, No. 4:92CV00443, slip op. at 11 (E.D.Mo. Aug. 23, 1993).[14] Third, those affidavits presented by

[14] The only significant evidence presented by the state at Schlup's trial was the testimony of two prison guards who gave conflicting statements as to the details but who both testified that Schlup was the third participant with O'Neal and Stewart. Unlike O'Neal, whose clothing was covered with Dade's blood, no physical evidence linked Schlup to this crime. Neither guard has ever been asked about Randy Jordan, whom Schlup asserts was the prison "snitch." In addition, Schlup's counsel informed us during oral argument that one of the two prison guards has, and had at the time of Schlup's trial, a criminal record that includes three felonies. Under Missouri law, these felonies, though not of recent origin, could have been introduced to impeach Maylee if trial counsel had only conducted sufficient investigation to uncover their existence. The record reveals no evidence that such an inquiry took place, and the jury was consequently deprived of this evidence as well.

Schlup that identify the actual perpetrator point to Randy Jordan, whose whereabouts are presently unknown but, unlike in Herrera and Blair, who is not known to be deceased. And fourth, Schlup has maintained his innocence since the beginning, while both Blair and Herrera had, knowingly and voluntarily or not, confessed. Schlup presents a much stronger case of actual innocence than did either Blair or Herrera. The present petition presents substantial grounds upon which relief might be granted, and we should therefore stay Schlup's execution and remand this case to the district court for an evidentiary hearing.

V

The legal rulings by this court and by the district court place Lloyd Schlup in an inextricable bind. Why the court asks, did you not present this evidence sooner? Because my earlier counsel failed to conduct a reasonable investigation, Schlup responds. Why then do you not

present us with pillars of the community to prove your innocence? Because the crime occurred in prison, he replies, and few pillars of the community occupy prison cells. That, says the court, is unfortunate, for absent virtuous eyewitnesses or a time machine, there is nothing we can do. Just as the Ninth Circuit told Henry Deutscher in regard to his death sentence,[15] this court tells Lloyd Schlup in regard to his conviction: You may indeed be innocent, but you are not innocent enough early enough.

Justice requires that we remand this matter to the United States District Court for an evidentiary hearing.

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

ORDER
November 17, 1993.

The suggestion for rehearing en banc and the motion for stay of execution are denied. Chief Judge Arnold, Judge McMillian, and Judge Wollman would grant the suggestion and the motion.

RICHARD S. ARNOLD, Chief Judge, dissenting, joined by McMILLIAN and WOLLMAN, Circuit Judges.

---

[15] See Deutscher v. Whitley, 991 F.2d 605, 606 (9th Cir.1993) (holding that although Deutscher had "shown to [the court's] satisfaction that it is more probable than not that, but for his constitutionally deficient counsel, he would not have been sentenced to die," he nonetheless did not satisfy the new standard set by the Supreme Court in Sawyer, and consequently did not merit relief).

I would grant the suggestion for rehearing en banc to consider two questions raised by the petitioner Lloyd Schlup.

1. Schlup argues that he is actually innocent of the crime of capital murder in the sense necessary to enable this Court to avoid the state's procedural defenses and reach the merits of his contention that his trial counsel was ineffective. In assessing this claim, our panel applied the rule of McCoy v. Lockhart, 969 F.2d 649 (8th Cir.1992). In McCoy, we held that a miscarriage of justice for purposes of avoiding procedural defenses can be found only when petitioner has shown by clear and convincing evidence that but for the constitutional error, no reasonable juror could find him guilty. 969 F.2d at 651. The McCoy court lifted this standard from Sawyer v. Whitley, ___ U.S. ___, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), a case having to do only with the question of punishment, not that of guilt or innocence.

As our panel in the present case acknowledged there is some warrant for Schlup's argument that Sawyer was intended by the Supreme Court to apply only to questions of punishment, and that the Sawyer opinion itself preserves unchanged, for purposes of the guilt-phase, the earlier standard of Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (requiring a petitioner to show a fair probability that, in light of all the evidence, the jury would have entertained a reasonable doubt of his guilt). See Sawyer, ___ U.S. at ___ n. 5, 112 S.Ct. at 2519 n. 5.

Our panel did what it had to do. It was bound to follow McCoy and it did not, as a panel, err in doing so. It

seems to me, though, that there is a substantial question whether McCoy correctly interpreted Sawyer. This is a question of great importance in habeas corpus jurisprudence, and I believe it qualifies as deserving of this Court's en banc time.

2. Petitioner raises another "innocence" issue – this one an independent ground for habeas relief, rather than just a gateway through which procedural defenses can be avoided. As I understand the various opinions in Herrera v. Collins, ___ U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), a majority of the Court appears to believe that, in a sufficiently strong case, innocence would be a ground for habeas relief. The case would have to be "truly persuasive" and "extraordinary." We know that these standards were not met in Herrera itself or in Delo v. Blair, ___ U.S. ___, 113 S.Ct. 2922, 125 L.Ed.2d 751 (1993) (per curiam). In Blair, a stay of execution was dissolved on the ground that the evidence of innocence was no more persuasive than that presented in Herrera.

In my view, it is likely that Schlup's evidence of innocence is substantially more persuasive than Herrera's or Blair's. I am not nearly so familiar with the record as the members of the panel, but Judge Heaney's dissent convinces me that there is at least a substantial likelihood that a trier of fact would consider Schlup's evidence sufficiently persuasive to meet the high Herrera standard if an evidentiary hearing were held. To be sure, there are contradictions in both sides' evidence, and I agree with the panel that, even after all of the new evidence is considered, a reasonable jury could still find Schlup guilty. In this sense, the Herrera standard seems easier to meet than the Sawyer standard, which is quite close to

that of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In other words, under Herrera, if evidence is newly discovered, a habeas petitioner could obtain relief by making a "truly persuasive" or "extraordinary" case, even if, after considering the new evidence, a reasonable jury could still convict him.

This, at any rate, seems to me the present state of the law. If I am right, Schlup may have a substantial ground for relief. Whether he does not is admittedly a fact-intensive question, not the sort of thing of which en banc proceedings are normally made. But where human life is at stake, I believe rehearing en banc is appropriate whenever a petitioner makes a substantial claim, even if it is fact-specific.

For these reasons, I would grant the suggestion for rehearing en banc, and I respectfully dissent from the order denying it.

Supreme Court of the United States

No. 93-7901

Lloyd Schlup,
Petitioner

v.

Paul K. Delo, Superintendent, Potosi
Correctional Center

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 1 and 2 presented by the petition.

March 28, 1994